

REPORTS
OF
CASES
ARGUED AND DETERMINED
IN THE
COURT OF APPEALS
OF
VIRGINIA.

BY
BUSHROD WASHINGTON.

VOL. II.

RICHMOND:
Printed by THOMAS NICOLSON,
M,DCC,XCIX.

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1874
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3405
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THOMAS NICHOLS
LITHOGRAPHER

TO THE PUBLIC.

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E R R A T A.

iv. v

PAGE. LINE.

- | | | |
|-----|--------|--|
| 11 | 41 | <i>For hinder read hinders.</i> |
| 54 | 26 | <i>Insert by before the words the owner.</i> |
| 66 | 4 | <i>Strike out the comma after mother and put a period.</i> |
| — | 12 | <i>Strike out the semicolon after it and put a comma.</i> |
| 68 | 5 | <i>For empowed read empowered.</i> |
| 69 | 36 | <i>For 1 read 3.</i> |
| 70 | 17 | <i>For appellant read appellee.</i> |
| 71 | 2 & 3 | <i>For appellant read appellee.</i> |
| 87 | 8 | <i>After testimony insert of.</i> |
| 98 | 17 | <i>After regarded insert it.</i> |
| 99 | 31 | <i>After rule, strike out the mark of interrogation and put a period.</i> |
| 106 | 12 | <i>For lands read land.</i> |
| 122 | 44 | <i>For forfeiled read forfeited.</i> |
| 139 | 7 & 14 | <i>For security read surety.</i> |
| 140 | 4 | <i>For principal read plinciple.</i> |
| 163 | 32 | <i>Before superior read the.</i> |
| 182 | 21 | <i>For laws read law.</i> |
| 206 | 4 | <i>After it insert to.</i> |
| — | 21 | <i>For principal read principle.</i> |
| 209 | 14 | <i>For determination read termination.</i> |
| 212 | 11 | <i>After but insert where.</i> |
| 224 | 37 | <i>After idea put a semicolon.</i> |
| 225 | 40 | <i>After that insert of.</i> |
| 227 | 3 | <i>Strike out not.</i> |
| — | 34 | <i>After endorfer, strike out a period and put a comma, after 443 strike out the comma and put a period.</i> |
| 242 | 14 | <i>Strike out the semicolon after fault.</i> |
| 243 | 24 | <i>After not insert an.</i> |
| 244 | 41 | <i>Strike out the semicolon after declarations.</i> |
| 249 | 2 | <i>For is read as.</i> |
| 255 | 10 | <i>For prices read price.</i> |
| — | 12 | <i>After Johnson, strike out the semicolon and put a comma.</i> |
| 261 | 19 | <i>Strike out the comma after the word Stockdell, and put a period.</i> |
| 263 | 37 | <i>For law read all.</i> |
| 266 | 25 | <i>For points read point.</i> |
| 270 | 27 | <i>Strike out the comma & put a period after the word plea.</i> |
| 278 | 9 | <i>For 2 read 1.</i> |
| 288 | 40 | <i>For survices read services.</i> |
| 289 | 1 | <i>For stronger read strong.</i> |
| — | 14 | <i>For centinental read continental.</i> |

39 For

PAGE LINE

- 289 39 *For collusion read collission.*
 292 22 *For decission read decission.*
 — 30 *Strike out of after the word General.*
 — 31 *For Hooker read Hocker.*
 293 19 *After the word intended insert)*
 — 21 *For legal read regal.*
 295 23 *After Carolina, put a comma instead of a semicolon,*
and strike out the semicolon after the word loci.
 — 38 *For desribed read described.*
 296 8 *Strike out the comma after bills.*
 — 35 *For there read these.*
 300 11 *For legal read regal.*
 301 26 *After damages, put a period.*
 302 8 *For is due read illue.*
 — 22 *After verdict insert ought.*

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[illegible]

C A S E S
 ARGUED AND DETERMINED
 IN THE
 COURT OF APPEALS
 IN
 THE FALL TERM OF THE YEAR,
 1794.



WALDEN Executor of WALDEN,
against
 PAYNE.

THIS was an action of debt, brought by the appellee against the appellant, in the District Court of Fredericksburg, on a bond dated in December 1776. The defendant put in the following pleas: 1st, Payment. 2dly, That at the time of issuing the original writ in this suit, he had fully administered all the goods and chattels of his testator, except £430, paper money of the value of specie and that he hath not, nor at the time of suing out the original writ in this cause, nor at any time since, had any goods of his said testator in his hands unadministered, except the sum aforesaid. 3dly, That the non-payment of the debt was owing to the plaintiff, wherefore and by virtue of the act entitled "an* act directing the mode of adjusting and settling the payment of certain debts and contracts, and for other purposes," he prays the court to award such judgment as to them shall appear just and equitable. The two first pleas conclude with a verification, and the record states "that to these several pleas the plaintiff replied generally, and issue was thereupon joined."

The jury found a special verdict as follows: that the defendant on the 27th of November 1778, had the estate of his testator duly appraised according to law, and at the same time proceeded

* See this act recited in a note to the case of Watson and Hartshorn vs Alexander, *ante* vol. 1, page 341.

proceeded to sell the whole of the personal estate except slaves, having by advertisement previously published in the gazette, given notice of the sale, and required all the creditors of the estate to make known their demands, and to receive payment. That the defendant on the first day of January, as well as in November 1778, offered to pay to the plaintiff the amount of his debt, including interest thereon, in the then circulating paper money, which the plaintiff at each time refused to receive. That the non-payment of the debt was owing to the creditor, the same having been offered and refused as aforesaid. That the defendant sold a sufficiency of the estate together with money in the house, and debts due to the testator, to pay all the debts owing by the estate. That on the motion of one of the legatees, an order was made by the County Court of Stafford in September 1778, appointing commissioners (of whom the plaintiff was one and acted as such) to divide the estate of the testator according to his will, in consequence of which, the estate remaining unsold and not disbursed in the payment of debts, or offered to the creditors, was on the 27th of November (more than a year after the testator's death) divided, and the share of each claimant delivered; no bond to refund being taken. That the estate so divided consisted entirely of slaves. That the money offered as aforesaid, was of the paper money then in circulation, and was liable and subject to the law for calling in and redeeming the said paper money, at one for 1000, and that the defendant had received of the same sort of money, to a greater amount than the plaintiff's demand; for debts due to his testator, and contracted previous to the year 1776. That one of the legatees is insolvent, and two others have removed to parts of this state, very distant from the defendant. That the defendant divested himself of the whole estate of his testator before the institution of this suit, in paying the debts, and in obedience to the order and division aforesaid, except £427 paper money, so offered by him to creditors. That the defendant has not paid the debt in the declaration mentioned. If upon the whole, the law be for the plaintiff, then they find for him, the debt in the declaration mentioned, to be discharged by the payment of the principal and interest, or so much thereof as to the court might appear just and equitable; otherwise for the defendant. Upon this verdict, the court gave judgment for the plaintiff for the full amount of principle and interest, from which the defendant appealed.

MARSHALL for the appellant. I shall insist first, that slaves are not assets in the hands of executors, if the personal estate be sufficient

sufficient to pay the debts. If so, then secondly, that the defendant has fully administered the assets. Thirdly, if these points be against the appellant, still the court may give an equitable judgment.

1st, Slaves by the act of Assembly passed in 1705, C. 3, are declared to be *real estate* with certain exceptions; and tho' some of the exceptions render them like to chattels, yet, there is no law which declares them to be assets, nor can the executor dispose of them as he may of the personal estate, for the payment of debts, unless there be a deficiency of the latter; in that case only can he sell slaves. The laws passed in 1727,* and in 1748|| were made, because slaves having been declared to be real estate, could not, as such, have been applied by the executor to the payment of debts, and the legislature, in these laws, have been careful to distinguish this species of property from chattels. If we refer to other laws, we shall find, that slaves are always contemplated as a species of property totally unlike to personal estate. Thus, in the law respecting distributions, slaves are not comprehended under the words *goods, chattels* and *personal estate*. Again, by the same law, the executors or administrators may distribute the personal estate after nine months from the death of the testator, taking bond and security to refund. But by the act of 1748, C. 3, § 30, the slaves of a decedent are to continue on the land to finish the crop (where the testator or intestate dies between the 1st of March, and the 25th of December,) until the latter period, when they are to be delivered to those having a right to them, well cloathed at the expence of the estate, and their crops are declared to be assets. Now mark the difference between slaves and personal estate. The latter may be distributed at one time, the former shall be delivered at another; in the latter, security to refund may be required, but not in the former. Why? Because they are not assets, nor as such liable to pay the debts, unless the personal estate be deficient. The obvious conclusion is, that this sort of property is made an auxiliary fund for the payment of debts, where the assets are insufficient, and the executors are empowered by a special law, to sell them *for that purpose only*. The executor in this case had no power to retain possession of the slaves, there being a sufficiency of personal estate, 1st, because the law not only imposed it as a duty upon him to deliver them up, but the judgment of a court having

* Act of 1727, C. 4, § 7.

|| Act of 1748, C. 3, § 29.

ing competent jurisdiction compelled him to do so, and this order, he was bound to obey, without a power given to him of protecting himself, by taking security to refund. Let it also be remarked, that it would be exercising an unnecessary, as well as an unjust rigor against the executor, to charge him with a *devastavit*, when the legatees may in a court of equity be resorted to. 2 *Vern.* 75, 205—1 *Vern.* 94, 162—2 *Ventr.* 360, 358—2 *P. Will.* 447. Should it be contended, that an executor before he delivers or pays a legacy, may demand security to refund, and that if he neglect to require such a security, he cannot compel the legatee to refund, I answer: 1st, that the cases on this head relate to personal estate only, which are always assets, and liable to pay debts; whereas, slaves are real estate, and are liable to pay debts, only as an auxiliary fund; that the executor is obliged to deliver them up within a limited time, without security, unless there be a deficiency of the personal estate. 2dly, The delivery in this case was not voluntary.

2d point. The verdict finds, that all the estate hath been administered except the slaves which were delivered to the commissioners, to be divided under the order of court, and £427 paper money. Now this money was either funded, or it was not. If the former, it remains a debt due from the public (worth according to the scale 8/6 specie) payable at a future day, as the public acts of the legislature prove. If the latter, it is taken out of circulation by an act of the government, and thereby deprived of all its value. In either point of view, it forms no part of the *assets in the hands of the executor*, being a debt due and uncollected. 2 *Bac. ab.* 417.

To charge the executor with a *devastavit*, he should be guilty of mismanagement, misapplication, fraud, or of paying legacies when the assets are insufficient to pay the debts. 2 *Bac. ab.* 435. The executor in this case did not mismanage, nor misapply the assets, by selling the personal estate and offering the money in discharge of the debts, because this was a part of his duty. Neither has he left debts unpaid, by disposing of the *assets* to legatees, if I am right upon the first point. If then, the executor is subject to no blame for delivering up the slaves under all the circumstances of the case, there is no possible ground left to charge him, unless indeed he can be chargeable with the consequences of a legislative act which destroyed in his hands the funds

the

reserved for paying the debt; an idea too monstrous to be contended for.

3d point. The issue upon the third plea is with the defendant, the jury having found, that *the non-payment was owing to the creditor*; and therefore, the court may give an *equitable judgment* on the case. I will not repeat all the equitable circumstances which appear to favor the executor, believing that no case ever exhibited more than the present. The case of Kenner and Turner in the old General Court, was not so strong in favor of the defendant as the present, for in that, the court interfered, even after a verdict rendered upon the plea of payment. The case was, that Turner, who was indebted to Kenner, *offered to pay the debt*, (without making a *legal tender*) which was refused. The court scaled the debt as of the day when the offer was made, because Turner, holding the money in his own right, was presumed to have afterwards made use of it, it not being improper in him to do so; it was therefore thought just, that he should sustain the loss by subsequent depreciation. But in this case, *the executor*, acting as a *trustee*, ought not to be presumed to have used the money, because it was improper that he should have done it, and therefore, it would be unjust to make him bear any part of the loss by depreciation, but it should be born by the creditor, for whose use the trustee held it.

RONOLD for the appellee. There might be some weight in the arguments drawn from the hardship of this case, if the jury had not expressly found, that the executor had notice of the debt in question before the division took place. But the arguments chiefly relied upon are 1st, that slaves are assets only *sub modo*. 2dly, That they were delivered to the legatees under the judgment of a court. In answer to the first, I would observe, that slaves in the hands of an executor, resemble personal chattels in almost every respect; for 1st, the possession of them belong to the executor. 2dly, They cannot be taken by a legatee without his assent. and 3dly, They are subject to the payment of the testator's debts.

That the possession of them belongs to the executor is evident, because he is to deliver them to the legatee, which he could not do, if he had no right to possess them, and they, like the personal estate, are to be inventoried and appraised, § which would be absurd, if they were considered as real estate. That the executors assent to vest the possession in the legatee is necessa-

ry

ry, is not only proved by the law just alluded to, but is necessarily implied from the power given him to sell them for payment of debts. These circumstances form the strong line of distinction between real and personal property. But it is contended, that they cannot be sold but as an auxiliary fund to the personal estate. This is equally the case with specific legacies, which cannot be sold, unless there be a deficiency of other property, and yet it never was contended, that they are not assets. Another circumstance is, that the penalty of an executor's bond, is always so fixed, as to cover the supposed value of the slaves, as well as of the personal estate. Were it otherwise, an executor might waste that part of the estate, so as to defeat the rights, not only of creditors, but of others. The truth is, that slaves, though real property *in a course of descents*, are considered like other chattels in cases where the executor has a power over them for payment of debts. They cannot be sold any more than specific legacies can, for the purpose of paying pecuniary legacies, nor even debts, unless there be a deficiency of the personal assets.

As to the order of the County Court, I do not conceive that it was obligatory upon the executor, as it was made upon an *ex parte* motion, and without a regular suit. There is no law which authorises this mode of proceeding, and consequently the order was entirely extrajudicial. Besides, the executor was bound to oppose it, and to state the necessity of his retaining the possession until all the debts were paid; this at least he ought to have done, before he could attempt to excuse himself against the consequences of his having obeyed it to the prejudice of others.

As to the finding upon the third plea, it surely cannot avail the appellant, because the act pleaded and relied upon, relates by express words to contracts made *after the 1st day of January 1777*, and this was entered into *prior to that date*. The preamble of the law states the inconveniences resulting from the depreciation of the money, in respect of contracts entered into between the 1st day of January 1777, and the first day of January 1782, and is therefore inapplicable to all other cases. Besides, if a legal tender had been made, yet the jury should have found, that the money was such, as might be *lawfully tendered*, which they have not done.

MARSHALL in reply. It must be admitted, that the decision of the County Court was not made upon proceedings regularly conducted; yet as that court had *jurisdiction over the subject*, the judgment standing in force and unreversed, was obligatory upon the executor. It

It is true, that the 2d section of the act of 1781, is confined to contracts made after the 1st day of January 1777, but it does not follow that the law is confined entirely to contracts entered into between the periods mentioned in that section. The third section (since it declares, that execution shall not issue upon *any judgment* theretofore obtained, before December 1783;) obviously is not, and why should the 5th section, which is as general as language could make it, be restrained in its operation, when the mischief intended to be remedied, is the same? If it were just, that an equitable judgment should be given upon a contract made on the 1st of January 1777, where the non-payment was owing to the creditor, is it not as much so, if it had been made on the last day of December 1776? And since the words of the 5th clause of the law, do not expressly confine the cases to particular contracts, the court will so construe the act, as to extend the relief to every case coming within the mischief.

An objection which was over-looked in opening the cause, may here be mentioned; it is, that no issue is made up. The pleas conclude with an averment as it was proper they should, to which there is no replication. The case of *Stevens and Taliaferro* (ante vol. 1, page 155) is in point.

RONOLD. There is certainly no ground for this objection after verdict, and a defence made. The record states, that the plaintiff replied generally to the plea, and that issue was thereupon joined. Although the pleadings might have been more formal, yet it is too late after verdict to make an objection.

LYONS J. delivered the opinion of the court. The principal point made in this cause on the part of the appellant is, that slaves are real estate, and can only be considered as assets in the hands of the executors *sub modo*.

Slaves from their nature are chattels. They were originally so, and the law made them real estate only in particular cases, such as in descents &c. But in most other instances, and especially in the payment of debts, they were declared to be personal estate. It is true, the law has protected slaves from distress, or sale, where there is a sufficiency of other personal estate to pay debts or levies, and in this respect they differ from other chattels; but this qualified exemption does not change their nature, or give to them the qualities of real property. Slaves therefore, being clearly assets in the hands of an executor, and liable to the payment of debts, the executor had a right to demand security of the legatees before he delivered them up, and a court of equity would not have compelled him to part with the possession,

session, without such security being given, upon the principal of making him do equity who would have it. The executor appears in this case to have consented to the division directed by the County Court, since it does not appear, that he disclosed the fact of debts subsisting against the estate, or that he opposed the order which was made upon any principal whatever. That order should be construed according to the reason and justice of the case, and that it was intended only to compel a division of the estate which should remain, *after satisfying all legal demands against it.* If the executor, with a knowledge of this claim, chose to deliver the slaves to the legatees, without taking security to refund, under an opinion, that he had money in his hands to satisfy the debt, he might have made a legal tender of the money, and thus have exonerated himself. But this he did not do. The executor being a trustee for creditors, ought to have taken care to keep enough in his hands to satisfy them, and it is no answer to their demand against him to say, that they may pursue the legatees. They are under no obligation to follow the estate, though they may do so, if they please. Whether the executor has subjected himself to a devastavit or not, would be a premature enquiry at this time; when a suit is brought suggesting a devastavit, that question may properly be decided.

As to the other objections, there is no weight in them. The act of 1781 relied upon in the third plea, does not extend to contracts made antecedent to the 1st of January 1777. This act has been greatly misunderstood. The principle of the decision in the case of Kenner and Turner was soon after reconsidered and corrected; for it was absurd to scale specie debts. Whether the executor in this case kept the money or not, does not appear; but if he did not make *a legal tender and keep it*, it was his own fault.

Tho' the issues are not formally joined, yet they have been fairly tried, and being found by the jury, it is now too late to seek an advantage in consequence of that informality.

Judgment affirmed.

JAMES

JAMES ROY & others,
against
 MUSCOE GARNETT.

THIS case, which on account of its importance and difficulty, had been continued for a full court, came on this term, to be argued. It was an ejectment, brought in the District Court of King and Queen, by the lessee of the appellants, against the appellee, wherein the parties agreed a case, the material parts of which, are as follows, viz: That James Garnett the elder, being seised of the lands in question, as well as of other tracts, by his will dated the 18th day of April 1765, devised the premises in question to his son James, by the following clause viz: "I give to my son James the tracts of land purchased of Thomas Hawkins, Young Hawkins &c. for and during the natural life of my said son James, remainder to my son Muscoe, and his heirs, in trust, and for the use of the first, and every other son of my son James, *who shall survive him*, in tail male equally to be divided; *but if my son James should die without male issue*, then I give all the said lands to my son Muscoe, during his life," with like remainders to his first and other sons, who should survive him, in tail male equally to be divided, but if he should die without heirs male, then in trust for the testator's three grandsons, with like remainders to the first and every other son of his said grandsons who should survive them, in tail male, equally to be divided, remainder to Muscoe in fee. To his other sons, and to three grandsons, the children of a deceased son, he also devises lands with like limitations, and after disposing of his slaves and personal estate he says, "It is my will, that whatever woman my sons and grandsons marry, or have married, they the said woman, shall be entitled to dower in the lands and slaves, devised to my said sons and grandsons respectively." [The other clauses in the will, so far as they were thought important, are taken notice of in the argument, and therefore need not be here stated.] It is further agreed, that James the devisee, died in October 1780, having never had male issue, and by his will devised the land in question to his daughter Molly, who died in October 1790, leaving the lessors of the plaintiffs her only children. That the defendant is the same person as is mentioned in the will of James Garnett the elder by the name Muscoe.

The District Court gave judgment for the defendant.

B

CAMPBELL

CAMPBELL for the appellants. The question is whether James the son took an estate tail, or only an estate for life. If the former, then the act of 1776 for docking intails, enlarged this estate into a fee simple, and the plaintiffs as heirs of Molly, the daughter of James the son, are entitled. If the latter, then James having died without leaving male issue, the remainder took effect in the defendant. I am to contend for the former construction.

The clause of the will under consideration has three branches. 1st, The devise to James for life. 2d, The limitation to his surviving sons in tail male, equally to be divided. 3d, The limitation to Muscoe, if James should die without male issue.

The first branch of the devise must be enlarged by one or other of the remaining branches; that is to say, either by the 2d, which contains the limitation "to the first and every other son of his said son James, who should survive him in tail male, equally to be divided;" or by the last, which gives the estate to Muscoe, "if his said son James should die without male issue."

The rule of law under which this enlargement of the estate for life must take place is, "that wherever the ancestor takes an estate for life, and there is a limitation to his heirs or issue, in the same deed or will, these words, shall be words of limitation and not of purchase, and will vest the inheritance in the ancestor;" Shelly's case; 1 Co. Rep. 99. Tho' this rule in modern times hath not governed universally, yet it is stated by Lord Mansfield in the case of Long and Lamming, 2 Burr. 1106 1107." that it is never departed from but in favor of intention.

The rule with the exception from it, being thus established, we are to inquire, whether the devise to James *for life*, be enlarged, either by the 2d, or by the 3d branch of the clause under consideration?

I shall not contend that the estate is enlarged by the 2d branch of the devise, "to his first and every other son who shall survive him, in tail male, equally to be divided," 1st, because the words are descriptive only of *certain issue male*, namely, *surviving sons &c.* and not of his issue male generally. 2dly, Because the estate is to go to them as tenants in common, under the words, "equally to be divided," and therefore, cannot pass in a course of descents, which would carry it to the *eldest son only*. The sons therefore, must take as purchasers, and consequently under the rule which I have before mentioned, the life estate of the ancestor is not enlarged by the devise to them.

But I shall insist, that the estate for life is enlarged by implication, by the operation of the words, "and if my said son

James shall die without issue male, then to my son Muscoe," &c. In order to determine, and to support the truth of this proposition, I will 1st, consider the devise, as if the 1st and 3d branches of it had stood together, without the 2d being interposed; as if it had been thus, "To James for life, and if he die without issue male then to Muscoe" &c.

2dly, I will consider, how far the intervention of the devise "to the first and every other son in tail male equally to be divided," will alter the case; and lastly, I will close with an enquiry, concerning the intention of the testator, in order to ascertain the influence which it can have in this case, upon the results of the previous reasoning.

1st, I am to contend, that a devise to James for life, and if he die without issue male, &c. would have passed an estate tail to James. Inheritances have been created chiefly by *necessary implication*. The rule in Shelley's case, furnishes no doctrine, which is not exemplified, and proved by almost every gift or devise that can be conceived. Thus, in a gift to A. and his heirs, or heirs male, A. has only an estate for life, which is enlarged by the subsequent words, "to the heirs or heirs male." A devise to a man and his heirs male, gives him an estate tail, and the law will supply the words, "of his body lawfully begotten." *Co. Lit. 9 b.*

There are also other expressions, which are considered as being tantamount to those before mentioned; such as to a man and his seed; 2 *Vern. 766*. To one, and if he hath issue male, that issue to have it. 9 *Co. Rep. 128*—*Owen 29*—*Ventr. 227*, so to one, and if he die without issue. 1 *Ventr. 214*, King and Melling. *Hob. 30*—*Ventr. 230*—1 *Co. Rep. 99*. If then, the clause stood as I am now considering it, without the intervention of the devise to the surviving sons, it is clear, that an estate tail would have passed to James, because the remainder to Muscoe, being limited upon the condition, *that James should die without issue*, it could never vest until that event should take place. This brings me to the consideration of the

2d point, viz: does the intervening devise make any difference in the case? If it do, it must be upon one or other of two grounds; either that the general words, "and if he die without issue" must be referred to the intervening and preceeding branch of the clause, so as to mean *such issue as is there spoken of*, to wit, *surviving sons*: Or, that the intervening estate, hinder the first devise for life, and the last devise to the issue male from uniting, so as to make the latter, enlarge the former, or in other words, to vest in James an estate tail.

I say these are the only grounds; because if the devise is (notwithstanding the intervening estate,) to be construed in the same manner, as if it had been "to James for life, and if he die without issue male remainder over;" and if the words, "and if he die without issue male" are unrestrained, and mean *a general failure of issue male*, and not of any *particular issue*, then it is absolutely necessary, that James should have taken an estate tail as all the cases prove, because, it is clear, that the remainder over could not vest until there should be a general failure of issue male.

Here then seem to lie the great points between us. It is admitted, that the devise to the surviving sons does not enlarge the estate; or if issue male mean *such issue*, it is equally clear, that an estate tail did not vest in the father. But if it can be shewn that the implicative words are not so restrained, then it must be conceded on the other side, that James took an estate tail.

I shall at once admit, that an implication to enlarge an estate, must be a necessary one. "Thus if there be a devise to A, remainder to *all* his sons in tail, and if he die without issue male, then to B; it is clear, that the latter words "and if he die without issue male," will not enlarge the estate previously given; because, as the first part of the devise had comprehended *all* the issue male, the latter part can have reference to *none other*, and therefore, shall be construed to mean *such issue male*, and consequently will not operate to enlarge the estate. The *whole male issue* being comprehended, there is no *necessity* to enlarge the meaning of the latter words.

But if there be a devise to the 1st, 2d and 3d sons, down to the 6th, or to any other particular number of sons, and "if the tenant for life die without issue male, remainder over;" these words, shall not be construed to mean *such issue*, because the testator by the *generality* of the latter words clearly meant, that *all* the issue male should take, and the former words having only given the estate to a certain number, if the latter words were construed to mean *such issue*, a part of the issue would be left unprovided for, contrary to the evident will of the testator. In such a case therefore, the judges will not restrict the general meaning of the words, "issue male," but will construe them to mean *all the issue male*, and consequently, will determine the estate to be an intail in the ancestor. Langly *vs* Baldwin, *Fitzg.* 14. The Attorney General *vs* Sutton, 1 *P. Will.* 759. These cases seem to be decisive. They are founded upon the strongest reason, and are in unison with the best established principles

ciples of law. And if cases seemingly opposite to these should be produced, they will, if examined, be found not to vary from, but to strengthen the principle established in these cases.

The last point to be considered, is the intention. If it be contended that the testator meant to give *an estate for life only*, to James, because he has used expressions proper to evince such an intention, the answer is, that the intention is equally clear and strong, that *all the issue male* of James should take, and that Muscoe was not to take, so long as James should have issue male; and unless James took an estate tail, some of his sons might have died in his life time, *leaving issue*, who would be entirely unprovided for. If then there be two intentions, the one contradictory to the other, all the authorities prove, that a preference is given to that, which favors the issue, where it is clear they were meant to be provided for. The authorities, from Shelley's case, down to the latest that we meet with, prove, that an estate given expressly for life, may be enlarged by words of implication. But I doubt if one can be produced, where, if the issue were meant to be provided for, a construction has been adopted, which went to defeat them, merely because the estate was given to the ancestor *expressly for life*.

Let it also be remarked that the reason upon which the cases in England which aim at the destruction of the rule in Shelley's case is founded, is, that the tenant in tail might by suffering a common recovery bar the provisions intended for the issue, if a construction be made so as to vest the inheritance in the ancestor. This I consider to be the operative reason which has prevailed in those modern decisions which seem to weaken the force of the rule I have been contending for. But this reason could have no influence in this country whilst estates tail were permitted, because they could not be barred with the same facility.

I rely therefore, that upon principle, and upon authorities, James Garnett took an estate tail by implication; and if so, that estate was converted into a fee simple by the act of 1776, and descended to the lessors of the plaintiff, as the heirs at law of Molly, the only daughter of James Garnett.

WARDEN for the appellee. The rule laid down in Shelley's case considered as a general one, is not denied. But this rule is always departed from, in cases where it appears that the testator intended to give only an estate for life to the ancestor. That such an intention appears in the present case, we are to prove.

Let it be remembered that the intent of a testator is to be collected from his whole will, and not from any particular clause
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in it. This principle is laid down in the case of *Baddeley vs Lappingwell*, 3 *Burr.* 1541, and also in the case of *Frogmorton*, on the demise of *Bramston vs Holiday*, 3 *Burr.* 1618. No rule of law is better established than this, that an estate given without any words of limitation, passes only an estate for life, and yet, in the last mentioned case, where there are no such words, other words evincing an intention to give a fee, were considered as sufficient to set aside the rule. The intent, is the polar star to guide the construction of a will, *Swinb.* 10—1 *Burr.* 39, 49, *Robinson vs Robinson*, *Cro. Jac.* 448. *Dougl.* 321. Having thus admitted the rule contended for to be generally true, and pointed out the principle by which it is to be corrected, I shall insist, 1st, that the intention of the testator in this case was clearly to give an estate for life only to James, 2dly, There being no rule of law to prevent the issue male of James from taking by purchase, if the intention be clear that they should do so, the words of the devise under consideration are not sufficient to bring this case within the rule which is contended for.

First. The will shews, that the testator was desirous of disposing of a large estate amongst the male descendants of his name. To effect this, it was necessary to devise it to his sons, and to their male descendants. Hence we see him devising parts to his sons; other parts to his grandsons, the grandchildren of a deceased son, for and during their natural lives severally, with remainders in trust in each devise, for the use of the sons of those sons and grandsons severally, who should survive them in tail male, thereby intimating an intention, that the estates tail might commence in the male descendants of the devisees for life, and hence we find him giving dower to such women as his sons and grandsons might marry, clearly demonstrating, that he considered them as only tenants for life, and that without such a devise they would not be entitled to dower. But what principally fixes the intention of the testator, and proves that he knew what he was about is, that where he gives express estates for life, he also gives a right of dower to the widows; but to the widows of the sons of his sons and grandsons, in whom he supposed an estate tail commenced, he says nothing about dower, knowing that the law provided for such. In *Bagshaw and Spencer*, 2 *Atk.* 570, 579, the words “without impeachment of waste” were considered as sufficient to take the case out of the rule; and surely, those words do not furnish stronger evidence of intention, than may be drawn from the provision made in this case respecting

respecting dower. The case of King and Melling does not weaken this argument; for tho' dower is an incident to an estate tail, yet a power to make a jointure (as in the case cited) of the whole estate devised, is not an incident, but repugnant to such an estate, and therefore such a power could not take the case out of the rule.

Blackborne and Edgley, 1 *P. Wms.* 601, may perhaps be relied upon against me. But it must be recollected, that this case was decided prior to that of Bagshaw and Spencer, and besides, the words "without impeachment of waste" were in that case passed over *sub silentio*, the decision turning upon another point, to wit, that words of implication would turn an express estate for life into an estate tail. And if this principle be true, surely words of implication shewing a strong intent to give no more than an estate for life, which was *expressly* given, shall retain it in that situation. This brings me to the

2d point. I shall consider this clause in the will according to the subdivision thereof made by Mr. Campbell. The first member of the sentence it is admitted gives only an estate for life. The second member gives the whole fee to Muscoe in trust, and his estate, commences only when the estate for life ends; so that the fee, was not to be for the use of the legal heir of James, but for his use, *upon condition*, that the first son should be that heir, and should survive him, jointly with the other sons, not as a joint tenancy, but as a tenancy in common of an estate tail which was to commence in the sons. The sons therefore could not take by descent as tenants in common, because only the eldest son, or his representative could be heir to the father. From this consideration it is evident, that the estate tail was to commence in the sons, which is further proved by the position of the words in the sentence; the words *in tail male*, being placed between the words "*survive him,*" and "*equally to be divided.*" Doe and Lamming, 2 *Burr.* 1100.

The third member of the sentence is principally relied upon to constitute this an estate tail in James. Considering the operation of this part of the sentence upon the plain principles of common sense, the words *issue male* would be intended to signify *such* issue male, that is, a son, or sons surviving James. It might perhaps be even construed to mean the male issue of a deceased son or sons. But here, if there were any surviving son, the heir might be disinherited, and if there were no surviving son, but the sons of several deceased sons, they would all of them be issue male under the contemplation of the former member

ber of the sentence, and would take equally; and if they did, the estate would not pass according to the rules of inheritance to the heirs general or special; for by these rules, an eldest son is the heir, and so on, to his most remote posterity, and not all the male descendants, deriving their descent through males. The same difficulty would occur, if the words were construed to mean male descendants, either deriving their descent through sons, or daughters. Whichever exposition is taken, this conclusion follows, that the estate to the ancestor for life is not necessarily limited by the words "to his heirs general or special," and therefore the words of the devise are not of themselves sufficient to bring the present case within the rule. Keeping in mind that the intention is to be sought for in the whole, and not in any one part of the will, this conclusion follows, that as it is evident by the second member of the clause, that an equal division was intended amongst all the sons who should survive James, so when the male issue are spoken of, a like intention as to them is to be presumed, in case any such should be left. This is the only implication, under which, the law will presume that any estate was by the words devised to them, and they can derive no estate from the words, but by implication *Dougl. 264—3 Durnf. and East, 484.* This exposition gives effect to all the words, and consistency to every part of the will. That this is a necessary construction, will appear, when another principle of law is considered, to wit, that an express estate for life, cannot be altered by words of implication, 1 *P. Wms. 54*, *Bamfield and Popham* which is recognized and confirmed in the case of *Ives vs Legge, 3 Term Rep. 488.*

Upon the whole, it seems clear, that the true construction of this will is to give to James an estate for life, and to the surviving sons, or to the issue male, estates tail as purchasers.

WASHINGTON on the same side. To avoid the confusion which will generally follow, from plunging at once into the consideration of a multitude of authorities, I will endeavor to class them under four different heads.

The first, which begins with Shelley's case, need not be mentioned, because the rule is well understood and admitted.

The second, comprehends those which modify the rule in Shelley's case, and establish the principle, that *the intention of the testator shall prevail against the rule.*

This will lead to an examination of the intention in the present case, independent of the latter, which is justly termed the implicative branch of the clause.

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Though Mr. Campbell has conceded, that the second branch does not enlarge the estate expressly given for life, yet it deserves our consideration, so far as it tends to throw light upon the testator's intention.

The inconsistency which Mr. Campbell is forced into; ought not to be passed over; for tho' he admits, that the parts of the will which we rely upon to prove that an estate for life was intended, do successfully establish it, and that the intention must prevail, yet he finally concludes that James took a greater estate: those parts are,

1st, That it is given *expressly for life*, which I mention merely to repel the implication arising under the 3d member of the clause.

2dly, It is given to *sons* which is a word of purchase.

3dly, To sons *equally to be divided*, thereby breaking the course of descent; for if they take in the *character*, they must take in the *quality* of heirs. *Brow. Ch. Rep.* 206, *Jones vs Morgan Doe and Lamming.* 2 *Burr.* 1100.

4thly, There is a trustee appointed, which could only be for the purpose of preserving the contingent remainders. *Sayer and Masterman* cited in *Fearne on Cont. Rem.* 122.

5thly, The wives of the sons and grandsons are to have dower, but no such provision is made for the wives of the issue of the sons. This is a circumstance of considerable weight, and has been well enforced by Mr. Warden.

If we look no farther into this clause of the will, what case can be produced, containing so many strong proofs of intention, and who can doubt for a moment, but that James was meant to take an estate for life only? What then has become of the rule in *Shelley's case*, or how can it operate upon this case? The rule is best stated by lord Hardwicke in the case of *Bagshaw and Spencer* to wit: "that though the intention is to prevail, yet it must not conflict with the settled rules of law." But what are those rules? The same judge describes them; he says, that they will not permit a testator to create a perpetuity; to produce an abeyance; mount a fee upon a fee, or make an heir take chattels by descent.

Shelley's case would not apply at all, if it were not so modified, for the devise there, is to *heirs* male, which are words of limitation, whereas *issue* is properly a word of purchase. And in *Backhouse and Wells* it was said, that if the words had been *heirs* male, the operation of law would have over-ruled the intention

tention—*Pow. on Dev.* 360. Let me conclude my observations upon Shelley's case, by observing, that no judge has gone beyond the rule there laid down; the reason of it has ceased, and none are bound by it, but in cases coming strictly within it.

The above view of the question embraces the two first branches of the clause.

The 3d class of cases furnishes a rule, as well established as the one drawn from Shelley's case; it is, that an *express estate for life*, cannot be enlarged by words of *implication*, *Bamfield and Popham* 1 *P. Wms.* 54. This principle has never been controverted, and is recognized in the case of *Ives vs Legge*, 3 *Durnf.* and *East* 488; also in the case of *Lethieullier and Tracy* 3 *Ask.* 784. Now, this is a different rule from that in Shelley's case; not affected by it, and is in point, to defeat all the arguments drawn from the third branch of the will. This rule, I said was opposed by no case whatever; I ought to except that of *Blackborne and Edgley*; but that case is not an authority as to this point, because it is founded upon *Sunday's case*, which is not a devise of an *express estate for life*. This leads to the consideration of the

4th Class of cases, which operates upon the rule last mentioned, in the same manner, as the 2d class does upon that in Shelley's case, to wit, to correct and explain it. And the principle resulting from the rule thus corrected is, that an estate for life may be enlarged by words of implication, if the intention of the testator manifestly appearing, *cannot otherwise be effectuated*. Without this necessity the estate for life will not be increased; but the word *such* will be supplied.

Under this view of the question it will be found, that we occupy the strong ground which the appellant's counsel think they had secured. For in a case coming within the rule in Shelley's case, the person who would defeat the rule, must shew *an intention opposed to it*. And this would be our situation, if the issue made claimed by *by an express limitation*. But the limitation in this case arising only by *implication*, we have the rule in *Bamfield and Popham* on our side, and the proof of an intention *which cannot otherwise be effectuated* than by enlarging the estate for life, lies upon the appellant. It is not necessary for us to shew an intention to give an estate for life; the appellant's counsel must shew an intention sufficient to subvert the rule.

This will serve to introduce the following cases, which will also contribute to exemplify the rule in *Bamfield and Popham*. The first is the case, of the Attorney General *vs Sutton*, in which

which it was contended, that it was the clear intent to give to *all the issue*; and so it was. For 1st, a strict settlement was manifestly intended, since it is not to be supposed that the testator could have a preference to a 3d, more than to a 2d son, and of course his stopping at the 2d son, must have been an undesignated omission.

2dly, The words of the will in that case too plainly shew an intention to give an estate tail, to have admitted of a doubt: see the note to the report of this case in the last edition of *P. Wms.* 754.

3dly, The remainder there, is to a charity, here to a son.

The second case is Langly and Baldwin, which is much relied upon. In this also it is to be observed, 1st, that there was a clear intention to provide for all the sons in *strict settlement*. 2d, The course of descents is there preserved—in our case it is broken. 3d, In that, the only mark of a contrary intention is the devisee being freed from impeachment of waste; for that the clause respecting jointure proves nothing, has been well explained by Mr. Warden.

4th, In that, the remainder over is to a stranger.

These cases only shew, that where the intention is clear, and can only be supported by enlarging the estate for life, the court will do so; and this we concede. To give James then an estate tail, it is absolutely necessary to prove, that the testator *meant to provide for the son of a non-surviving son*. It is not sufficient to say, that such a person *would otherwise be unprovided for*, because, if this were all, it would be placing the proof of intention upon us, who are safe under the rule in Bamfield and Popham, unless an intention to give a larger estate than for life is shewn on the other side. In Bamfield and Popham, the rule was not departed from, tho' a posthumous son *might have been disinherited* under it, and this was an argument, much relied upon in opposition to the rule.

So in Blackburn and Edgley, tho' it was objected, that the adoption of the rule would prevent the sons and daughters from taking, yet the court would not for that reason dispense with the rule. So the same reason was urged in Lethieullier and Tracy, to wit, the exclusion of a great grand-daughter; yet the rule prevailed. In the case of Wyld and Lewis, 1 *Atk.* 432, cited in the case of Lethieullier and Tracy, an *express estate for life* was not devised. So too in 2 *Bac.* 68, who cites *Bulstr.* 63—*Dy.* 171, the rule was supported, tho' the heirs general might have been excluded. So the case of Doe vs Reason, cited

cited in *Doe vs Holme* 3 *Wils.* 244, is precisely apposite to the present, and answers all the objections.

It is not true then, that because *an inconvenience* may happen from the adoption of the rule, that therefore it shall be dispensed with; but it is essentially necessary to shew *an intention to provide* for the son of a non-surviving son, *growing out of the will*, for it is admitted that *the implication* must be a *necessary* one.

Upon the whole, these points seem to be established. 1st, That the intention of the testator was to give an estate for life—the construction contended for, is to defeat that intention.

2dly, There is no evidence of an intention to provide for the case which is supposed, and therefore no necessity to enlarge the estate of James, by implication.

3dly, To do so, would defeat the intention in another respect. For if James took an estate tail, to open and let in the sons of a non-surviving son, the eldest would take by descent, in exclusion of the others, tho' it was evidently the intention, that those who took should take equally as purchasers, and in this respect, our case differs most essentially from that of *Langly vs Baldwin*, where the course of descents was preserved throughout.

The answer given to all our cases is, that they are founded upon the power of tenants in tail in England to bar the right of the issue. But this is not the reason, as the case of *Lethicullier and Tracy* proves; and besides, there were two ways of barring estates tail in this country whilst such estates existed; the one by a writ of *ad quod damnum*, and the other by application to the legislature.

But if after all, intention is to be sacrificed, and all the rules of law destroyed in order to let in the son of a non-surviving son, I can see no reason, why he might not take by purchase as well as by descent, for *issue male* are properly words of purchase.

WICKHAM on the same side. It is agreed, that an estate for life is given to James, but it is contended, that the remainder unites with and enlarges it; and this doctrine is bottomed upon the rule in *Shelley's case*.

To this rule, we oppose that in *Bamfield and Popham*, which does most certainly defeat it, wherever the limitation over is not by *an express and direct devise to the heirs or issue*. But I contend, that if the devise in this case had been directly to the issue male of James, that the remainder could not upon the principle laid down in *Shelley's case*, unite with the estate for life. It is admitted,

admitted, that this union can never take place, where the estate for life and the remainder are of different natures; as if the one be a *legal*, and the other a *trust estate*. Now in this case, the inheritance after the death of James is devised to Muscoe in trust, and consequently, the *cestui que trust* would have been entitled before the statute of uses to a merely equitable interest. Is this a case within the operation of the statute? I contend that it is not, because that statute only vests *the legal estate* in him, who is entitled to the use or equitable estate, which can only be effected, when there is a person *in esse* in whom the use resides, 1 *Rep.* 126. But in this case there never was such a person in being, James having never had any male issue; and consequently, the legal estate which continued in the trustee until James should have such issue, never was executed by the statute, and therefore, the limitation to the male issue, never could incorporate with the life estate vested in James. It is equally necessary to produce this union, that the two estates should pass by the same conveyance. But in this case, James took under *the will*, and the *male issue*, (if there had been such,) *under the operation of the statute of uses*. The only way by which James can take an estate tail, is by uniting the estate given by implication in the third branch of the clause, with the estate for life given to him in the first. But if this union cannot take place from the different natures of the two estates, the certain consequence is, that he never had a greater estate than for life. If I am correct in this argument, there is an end of the cause.

The estate for life can only be enlarged by implication to favor the intention of the testator. But an implication to destroy the intention is an absurdity in terms. That the testator well knew the difference between an estate for life and an entail, is proved by the very clause under consideration, where he gives an intermediate estate in fee to a trustee, which could only have been for the purpose of preventing the union of the two estates, and to preserve that which he knew was contingent.

The testator could not by stronger language have expressed his will not to give an estate tail to his sons and grandsons. The many circumstances to prove this intention, which have been mentioned by the counsel who have preceded me, one would suppose were sufficient. But there is another. There are several devisees, to each of whom he gives an estate for life; then to the issue. But how? *In succession*, as estates of inheritance must go? No. But it was certainly his intention, that the *issue male* should take in the same manner as the *sons* did, and it is admitted

admitted that they took as *purchasers*, because they did not take *in succession*. If then, James is construed to take an estate tail, the issue male would have taken in a way not intended by the testator. This then forms the striking difference between the present case, and all those which have been relied upon by the appellant's counsel. In *King vs Melling*, there is no intervening estate changing the course of descents. The Attorney General *vs. Sutton* was reversed in the House of Lords. But admitting its authority, *the line of succession* was there preserved, and therefore the construction put upon the implicative branch of the devise went with the intention. The same observation applies to *Langly and Baldwin*, and *Dodson vs Grew* and others, 2 *Wils.* 322. This last case proves the principle which governed all the others, to wit, that the issue were intended to take *in succession*, which they could not do, if they took as *purchasers*. But here they were intended to take altogether, which they cannot do, if they take by descent.

It is contended, that Muscoe could not take so long as James had issue male living; and that the only way by which the son of a non-surviving son could take, was by descent from the father. It is evident that the testator never contemplated such an event, and therefore he could not mean to provide for it. But if he did intend that all the issue male should take, it was equally his intention that they should take *all together*, which they could not do, if the construction contended for be correct. Could a *grandson* of James have taken equally with *the sons* of James? Surely not; but the sons would have taken the whole, and left to their nephews a paltry remnant after the expiration of an estate tail. We have seen that the leaving of a posthumous son unprovided for, does not afford a reason for giving an estate tail by implication, where only an estate for life was intended, and yet this is an event as probable as that now supposed.

The last branch plainly refers to the children before mentioned, that is, to *surviving* sons; and the court will not stretch the meaning of it to *issue generally*, unless induced thereto, for the purpose of complying with the testator's intention, which I have endeavored to shew would be defeated by such a construction. The word *but* is plainly a word of reference to what had gone before; and that *heirs general* may by reference to preceding words be construed to mean *heirs male*, is proven by the cases read from 2 *Bac.* 68. So that the court will in this case take the whole clause together, and correct the last branch by the second, so as to mean, "if James die without male children surviving," &c.

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In many of the devises, the remainder is limited *immediately* over. For instance, the land devised to his grandson Augustine is "to him for life, remainder to James, in trust for the use of the sons of Augustine who shall survive him in tail male equally to be divided, remainder to all the sons of his grandsons Francis and Harry, who shall survive them in tail male equally, &c. *remainder to his son James and his heirs for ever.*" Now is it probable, that the testator meant to provide for the issue male generally in some cases, and to exclude them in others? The whole will should be taken together, and the same intention be presumed throughout; for it seldom happens, that the same idea is by the same person, and in the same instrument always expressed *in the same words*. We here find the testator sometimes using the words, "for want of heirs"—"heirs male"—"in default of issue male"—&c.

But suppose that a devise to the issue male generally of James, must necessarily be implied. May they not take as purchasers? It is assumed as a point given up, that they could not; and yet I can see no reason, why they should not, if it be so intended.

Even *heirs*, *eo nomine*, must take as purchasers, if they take otherwise than in the *quality* of heirs; and the issue male in this case cannot take at all, consistently with the intention of the testator, unless they take by purchase, for otherwise, they would come in by *succession*, and not *altogether*, which would contravene the intention.

Upon the whole, I think there is no principle which will bear the appellants out, in contending that James took an estate tail.

MARSHALL in reply. The single question in this cause is, did James Garnett take an estate for life, or an estate tail? I shall attempt to maintain the ground which Mr. Campbell has taken, though I shall not precisely follow him in the mode of discussing the subject. I shall contend,

1st, That upon authority, the male issue of the non-surviving sons of James must take before Muscoe.

2dly, That according to the intention of the testator, they must take before him.

3dly, That they must take by descent, and cannot take by purchase.

4thly, That if they take by descent, the estate must be in the ancestor, and therefore that James took an estate tail.

1st, It is a rule supported by a connected train of authorities, that wherever in a will devising a legal estate, a remainder over

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is to take effect on the failure of issue of a particular devise, or on failure of male issue, that such issue must take in infinitum by the implicative devise, before the remainder man, unless there be strong circumstances to take the case out of the rule. To prove this rule, I cite Robinson's case mentioned by *Ld. Hale* in King and Melling, 1 *Vent.* 230—*Gilb. Dev.* 38, 39—*Eq. Ca. Ab.* 185—Langly and Baldwin. Attorney General *vs* Sutton. Robinson and Robinson, 1 *Burr.* 58. To this rule, I admit there are exceptions, within none of which can the present case be brought; and within some one of them, all the cases cited against us are to be found.

A principle indeed has been urged, which if true in the latitude contended for, would embrace our case. It is; that an express estate for life cannot be enlarged by implication. In the extent it is laid in the books, I deny the principle to be law. Bamfield and Popham, a note in 3d *Durnf. and East* 488, and 2 *Bac.* 68, are cited in support of it. It is also laid down in Humberston and Humberston, which is decided upon the authority of Bamfield and Popham, and must therefore stand or fall with it. In Bamfield and Popham, *all the sons and their issue are provided for.* The only argument in favour of enlarging the estate for life was, that a posthumous son might be disinherited, unless the ancestor took an estate tail. It is not certain that the argument was applicable to the case, for even admitting that before the 10th and 11th of William and Mary, a posthumous son could not have taken, it is certain, that the case was provided for by that statute. This case was decided subsequent to the making of that statute, and we are not informed whether the testator died before or after it. But independent of this objection, I contend that that case is not law, and would shortly after have been otherwise decided. It is admitted, that the testator did not intend to exclude a posthumous son; and yet, the construction there put upon the will, was against the intention, upon the authority of the legal principle, that an express estate for life cannot be enlarged by implication. The principle as there laid down is totally unqualified and unrestrained, so that it would prevail against the clearest intention. The principle is exploded by all subsequent adjudications, and not attempted to be maintained by those which notice it. It is denied in the case of Blackborne and Edgley. I admit that Sunday's case does not support the principle for which it is there cited, but surely the cases which I have before mentioned, do most conclusively over-rule the solitary case of Bamfield and Popham. The decision

cision on the case from *Durnf.* and East turned upon the words of limitation which are superadded, and is besides, a mere *obiter dictum*, unnecessarily stated. But above all, I rely upon the decision of this court in the case of *Shermer vs Shermer* (ante 266) as over-ruling this principle.

Having cleared the cause of this rule so much relied upon, I proceed to state the exceptions to the principle I am contending for.

The first is, where the whole issue is provided for by the intervening clause. For in such a case, it would be unnecessary, and therefore absurd to create an implication for the purpose of providing for those who took by an express devise.

The second is, where a plain intention appears to exclude such issue. Within this exception is the case of *Blackborn and Edgley*, for the testator having declared an intention to provide for *his name*, it would have been a manifest violation of his will, to create an implication which should let in the females, who were clearly meant to be excluded. The third exception is where words of limitation are superadded, so as to render the first word *issue* descriptive of the *person*, and yet the issue *in infinitum* may take by force of the subsequent limitation. Or where there are other words annexed, making it merely descriptive of the person. Under this exception, is to be ranked the cases cited from *Moor* 593—3 *Wils.* 244—3 *Durnf.* and East 484. *Lyle* and *Gray*. Long and *Lamming* 2 *Burr.* 1100. The reason of the first member of this exception is obvious. *Issue* cannot be at the same time a word of purchase, and a word of limitation. If it be the former, only a life estate passes, as it merely describes the person of the first taker; where it is the latter, the issue take *in infinitum*.

Now if words of inheritance be superadded, the word *issue* may be taken as descriptive of the person, and the subsequent limitation will carry the estate to the heirs of the first taker; so that all the issue must be spent before the remainder-man can take. It is also evidence of intention, that the issue should take by purchase. This distinction was taken in *Loddington* and *Kyme* and has ever since been regarded.

The 4th exception comprehends the cases of trusts. For where application is necessary to be made to a Court of Chancery, that court will so mould the conveyance, as that the legal construction upon the words of it, shall, in favor of the intention, be different from what it would have been, if a legal estate had been originally conveyed. Upon this principle was *Bagshaw* and

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Spencer

Spencer decided. I might go further, and say, that this case is not easily to be reconciled with foregoing cases, or with Garth and Baldwin afterwards decided by the same judge. See *Jones vs Morgan*, *Brow. Ch. Rep.* 206. But it is not necessary to impeach that case, since the principle upon which the decision was made, is inapplicable to this.

This case comes not within any of the exceptions. For 1st, all the issue are not provided for, but on the contrary, the sons of non-surviving sons would be disinherited, unless protected by the implicative devise. 2d, They are not intended to be excluded. 3d, There are no words of inheritance grafted upon the limitation, nor are there any words descriptive of the person. 4th, Nor is it the case of a trust.

Second point. It is always presumable, that the issue *in infinitum* are intended to take before the remainder-man, where the limitation in remainder, depends on the failure of the issue of the first devisee. In this case, Muscoe Garnett is to take; but at what time? When James shall die without issue male. Can he then take sooner? The dying of James without male issue, is like a condition precedent. The construction contended for is the same, as it would have been, had the words "but if James shall die without issue male" been omitted: Why reject them? They are operative, there is abundant use for them, and they have a known, legal signification. Such words then are never to be rejected. This can only be the fate of such, as are senseless or repugnant. The intention to provide for the sons of non-surviving sons, is further proved from the devise to the surviving sons being in tail; for if *they* had been alone the objects of the testator's bounty, it would have been more beneficial to them to have had a fee simple, and tho he might prefer the surviving sons to grandsons, it is not easy to assign a reason for preferring the sons of *surviving sons*, to Muscoe, and yet preferring Muscoe to the sons of *non-surviving sons*. It is also material, that the property is distributed in tail male amongst families; each son and grandson, being considered as the head of that family. It is reasonable to suppose an intention, that the property should remain in the respective families to which it was assigned, so long as there were any male issue to take it.

The counsel on the other side have labored to prove, rather that James was intended to take an estate for life, than that the testator did not intend to prefer all the male issue of James to Muscoe. The former we concede. I believe in all the controverted cases upon this subject, the testator meant to give an estate

estate for life; but there is no incompatibility of intention, between giving James an estate for life, and preferring all his male issue to Mulcoe. The intention to provide for all the male issue is equally clear, and must over-rule the other intention. This is clearly stated in *Hargr. law tracts* 503. 2 *Wils.* 322. *Brow. Chan. Rep.* 220.

It is contended, that the provision for dower, is an unanswerable proof of the intention, to give only an estate for life. But does it shew an intention to exclude the male issue? A clause against impeachment of waste is not less strong.

Obj. That here are trustees to preserve contingent remainders.

Ans. The use of the trustee is not declared to be for this purpose, and therefore nothing as to intention is established by it. Besides, the trustee might have been necessary to preserve the contingent remainder *to the surviving sons*. *Lewis Bowle's case* cited in *Fearne* 28.

Obj. That if the testator intended to provide for the sons of non-surviving sons, he would not have given a remote remainder after the expiration of an estate tail.

Ans. If there were no surviving son, then the male issue of a non-surviving son is immediately provided for. If the sons had all survived, then all the male issue of James would have been provided for. If some survived, and others died leaving male issue, then the surviving sons are preferred, but the male issue of the non-surviving sons are preferred to the remainder man.

Obj. The word *but*, is a word of reference.

Ans. It is plainly intended to mean the same as *and*; in other devises, other words are used, obviously with the same intention.

Obj. The issue of non-surviving sons are certainly unprovided for in other parts of the will.

Ans. The limitations are not varied in the devises to his sons, and I do not see that the devises to his grandsons, can any more restrain those to his sons, than the latter can enlarge the former.

The case of the Attorney General *vs Sutton*, is said to be inapplicable, because in that, the will plainly meant to pass an estate tail. The words of the will in that case, to wit; that on a certain event, "the estate he had given to Thomas and the *heirs of his body* should be void," were not relied upon in making the decision of the court, nor are they mentioned by the counsel. But a trust and a legal estate were devised by the same words, and the devisee was adjudged to take an estate tail in the legal estate, and only an estate for life in the trust. If the words

relied

relied upon had evidenced an intention to give an estate tail, that intention would have controuled the trust, as well as the legal estate. Of course, the ground of that decision must have been that which was contended for, to wit, that all the issue were not provided for. Neither was the decision influenced by the remainder being limited to a charity; for it was admitted, that such limitations are favored. Tho' the plea was over-ruled in the House of Lords, yet the principle was established.

Many other objections are made to the application of Langley and Baldwin.

In that case, as in this, there is an express estate for life given; an estate tail to the sons, and the remainder was to take effect on the failure of issue. In what do they differ? Tho' the sons in this case do not take by succession as in that, yet no preference to the remainder-man can therefore be inferred. The intention to provide for all the male issue is as clear, as that the sons should take in a particular mode, and ought therefore to be effectuated. It is not more unlikely in this case, that the testator should mean to prefer the sons of surviving sons to the remainder-man, and not the sons of non-surviving sons also, than in that case, that he should prefer a 6th to a 7th son; both were equally unknown to the testator. But the ground of that decision, was obviously the principle we are contending for, to wit, that all the issue not being provided for by the *express devise*, there was an use to be made of the *implicative branch* of the clause.

Third point. This is bottomed upon the rule in Shelly's case, which has never been denied, and is admitted in the case of Jones *vs.* Morgan. The reason of the rule is, that if the heir do not take by descent, he can only take an estate for life; for taking by purchase, *he* only, and not *his posterity* is described. This principle is stated very clearly in Shaw and Weigh *Forfeiture*. 74, 78, that where the word issue is *nomen collectivum*, they must take by descent, and that in all cases where they take by purchase, it is *nomen singulare*, and the issue without further limitation can only take an estate for life. In our case, the word is *nomen collectivum*; it must mean *all the male issue*, or else the issue of that issue could not take, and the remainder would vest before a failure of issue, tho' by the express words of the will, it is to be postponed until a failure of issue takes place. The case from 3d *Atk.* 784 is not in point, because the limitation to the issue is restrained to *issue living at the death of the testator*.

In Long and Lamming, the heirs are so described, as to render it impossible for them to take by descent; it would have rendered

dered the devise totally void, and there are also words of inheritance superadded.

It is objected, that the sons of non-surviving sons must according to the intention of the testator take equally. But I conceive, this would go to defeat the intention, and could not be extracted out of the will, but by inserting limitations not in the will, and rejecting those that are.

4th point. The principle of this point is founded on Shelley's case, and is obvious. An estate cannot descend from an ancestor, unless it were first in him, and though James was intended to take an estate for life, yet his male issue were also intended to take, and if they can do so only by enlarging the estate of James, the *particular* must yield to the *general*; the less material, to the more important intention. The *mode* of taking, must be sacrificed to the more solid object of enabling them to take at all.

If I am right in these points, then it is plain, that James took an estate tail, which was turned into an estate in fee by the act of 1776, and of course, that the appellants are entitled to recover.

The PRESIDENT observed to Mr. Marshall, that he had not noticed an argument of Mr. Wickham's, which stated an objection to the union of the two estates in James; to wit: that the one was a *legal*, the other a *trust estate not executed*.

Mr. MARSHALL. The fact as stated by Mr. Wickham is not admitted, and if admitted, cannot I think be material. The devise to the trustees is for surviving sons, and may, or may not extend to the issue. If it do not extend to the implicative devise, then the fact is not as it is stated, and there exists no difficulty in the case.

But admit that it do not extend to it. Devises of estates executed by the statute are, (so far, as I have yet discerned,) assimilated in every respect to a devise of a plain legal estate at common law. The devise under the statute would execute in the same person, and take effect beneficially to the devisee, precisely at the same time, with a devise of a legal estate at common law. I have seen no case determined on this distinction, and yet such would naturally occur. For if the statute in this case will not execute the use in the ancestor, until the issue come in *esse*, neither would it have executed it, if the devise had been to trustees for the use of James, remainder to the same trustees for the use of the issue; for the first devisee being in *esse*, no legal estate whatever with respect to him is in the trustee, and it is in law
just

just the same, as if the devise had been immediate to James. Yet in such cases, the estates have been united, and therefore, the difficulty stated to the union in this case cannot be a solid one. The case in *2 Wils.* 322, is a devise immediately to the first devisee, with remainder to the use of the issue, and there we find, that the two estates incorporated, and vested an estate tail in the first taker.

The PRESIDENT delivered the opinion of the court.

The material parts of the agreed case are, that James Garnett by will, devised the estate in question to his son James for life, remainder to his son Muscoe in fee, in trust, for the use of the first and every other son of James who should survive him in tail male, equally to be divided; but if James should die without issue male, then he gave the land to Muscoe for life, with like remainders to his first and every other son who should survive him in tail male, equally to be divided; but if Muscoe should die without issue male, then in trust for three grandsons and their surviving sons, in tail male, equally to be divided, remainder to his son Muscoe in fee.

After having disposed of his slaves and other property to his children and grandchildren by the different clauses of his will, he declares, that their respective wives should be entitled to dower. The testator died before the year 1776.

James survived that period, never having had a son, but leaving a daughter his heir at law, under whom the appellants claim, insisting that James took an estate tail, under the will, which by the act of 1776 was turned into a fee simple, which descended to his heir.

The appellee contends, that James took an estate for life only, on which the act did not operate, and that the contingent remainders limited upon that estate, being at an end, the remainder to him is become vested in possession.

The conclusion of each party is right from his premises, and brings us to the question, which of those estates James took; whether for life or in tail?

Upon the face of the will itself, difficulties arise, what was the testator's intention. As usual therefore, authorities are produced, for the purpose of illustrating, or of controuling it; multifarious indeed, but in general unsatisfactory; containing rules of construction, as well as principles and reasoning from them by different judges, in many cases obscure and contradictory.

In bringing these into review, the gentlemen of the bar on both sides, have ably discharged their duty, in giving the court full information on this complicated subject.

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That the testator's intention is to be the general rule of construction, was laid down soon after the statute of wills. It has never been contradicted, but is amplified, rather than restrained in all subsequent instances.

The exception to this rule, "that he shall not be allowed to controul or change settled principles of law, as established by the judges," seems to be as fixed as the rule itself.

But another exception, that the intention shall not interfere with the established rules of construction, which judge Blackstone states, as of a flexible nature, has produced in its application, a variety of reasons and decisions, which I am not able to reconcile, and therefore am inclined, as I always have been, to look to the will itself, and not to those unsettled rules of construction.

That the testator intended to devise an estate for life to James, could not be made more manifest than from the will itself, if confirmed by one from the dead, even if that were the testator himself.

But if a subsequent part of the will shews a manifest intention, tho' not so strongly expressed, to provide for all the male issue of James, and both intentions cannot stand, that of the devise for life must yield to the other, which is supposed to be most important in the testator's mind.

Cases may be classed into those, where the conflict of intention arises from *express devises* in the will, and those, where they are to be *implied from what is expressed*. To the first sort, the case of King *vs* Melling applies. A devise to A for life, remainder to the issue of his body by a second wife, remainder over; A, was adjudged to take an estate in tail, as the only means of providing for the issue, who could not take as purchasers, not being *in esse*, and could only take through the ancestor; and for that purpose, the estate for life was turned into an inheritance according to the rule in Shelley's case. This case is constantly referred to, in most, if not in all subsequent cases, and its principle, as well as its authority is no where denied.

In questions of this sort, it has been thought a circumstance of considerable weight, that issue must be taken as a word of limitation, where no words of inheritance are superadded in the devise, because in such a case, if the issue take by purchase, they would only take an estate for life. From hence a distinction has arisen, that where words of inheritance have been superadded in the devise to the issue, the issue has been adjudged to take by purchase, so as not to enlarge the estate of the ancestor; and
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this was Archer's case, 1 *Cooke* 66, and in several cases since. But in others, it has been decided not to have produced that effect, and the point has been determined upon another circumstance, to wit: that of the issue being *in esse* at the death of the testator, or of the tenant for life, or within a reasonable time after; as in the case of a devise to the heirs of I. S, who is living. And under this distinction, the parties have rightly agreed, that the devise to the surviving sons did not enlarge the estate for life in James, since the surviving sons not only might, but must take as purchasers, being to take, not *in succession*, but as tenants in common. The part of each son would descend to his male issue, which would thereafter go in succession in tail male to the eldest son, and would not, (as the appellee's counsel supposed,) continue to go in common to all future generations. So far then, the estate for life is preserved, being consistent with the other intention to provide for surviving sons.

But the difficulty results from the testator's being supposed to have devised the land to his male issue, upon the contingency of his having no surviving sons, which it is said, he manifestly intended, from having given over the estate to Muscoe, upon the death of James without male issue, thereby shewing that he did not intend Muscoe to take the land, so long as there were any male descendants of James. We come therefore to the second class of conflicting intentions, not collected from *express devises* to the issue, but to be implied from what is expressed, on which subject, there are a number of cases, the decisions in which are extremely various, and sometimes contradictory. But the most prevailing rule seems to be, that an *express devise* for life, is not to be changed into an estate of inheritance *by implication*, unless that implication be a necessary one, because the testator's intention to be collected from the whole will, cannot otherwise be effectuated. To take up the present case on this rule. If there be any apparent intention to provide for the issue male of James, in case there were no surviving sons, or in case their male issue should fail, it is evident, such provision, (if the case happened) could no otherwise take effect, than by a descent from James, and by that means changing his estate for life into an estate tail, thereby producing that sort of *necessity*, which will admit a devise even by implication to controul an express devise.

The case furnished by the will, of a chasm between the provisions for *part of the issue of James*, and the limitation over upon the failure of his *whole male issue*, though uncommon, is not

not new. The case of Langly *vs* Baldwin, seems to apply directly to it. There, the testator gave to his grandson an estate for life, without impeachment of waste, and with power to make a jointure to his wife for life, and after his death, devised to his six sons, one after another, in tail, and made provision for no other sons; but added, that if his grandson should die without issue male, the estate should go over. It was adjudged, that from the express limitation over, the testator intended to provide for all the issue male of his grandson, altho' they should not be one of the six; and as that could not be effected any other way than by descent from the grandson, the court adjudged him to take an estate tail, tho' expressly given for life.

The same thing was done in the case of the Attorney General *vs* Sutton, where a provision was made for two sons only of the tenant for life, with a limitation over upon his dying without issue male of his body. Here then are two according decisions, which apply to the case at bar in terms, and in principle, and if not contradicted, must be considered as fixing a rule of property. The case of Popham and Bamfield is produced in opposition to those I have just mentioned. That was a devise to Popham for life, remainder to his first &c. son successively in tail male, and for want of issue male of Popham, remainder over.

An attempt was made to bring this to the former cases, by supposing that there was a chasm between the provision for the sons, and the limitation over, and this could only happen, and might happen in the case of a posthumous son, who it was said could not take under the provision. Whether he could or could not is immaterial. The answer which the court gave was, that though it might have been intended that such posthumous son should take, yet the testator was herein mistaken as to the law, or he might not consider of it, being a remote mischief or contingency, and therefore supposing he had made provision for all the sons of the tenant for life, his intention might be complied with, without enlarging the estate for life, and both intentions might be preserved. Without taking notice, that this case, being produced afterwards in the case of Blackburn *vs* Edgley, the court is said to have exploded the notion, that words of implication should not turn an express estate for life into an estate tail, I observe, that the case in principle does not contradict the former cases, being unlike them in this, that in that all the sons are provided for. This curious case may happen; Muscoe Garnett takes this estate in remainder, as well as all the lands devised immediately to himself, in the same manner as James did;

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if he has several sons, and they should marry, it may happen, that all of them may die in his life time, and some, if not all of them leave sons, and his whole estate may go over in remainder from his grandsons, upon the principle he now contends for, that an implied remainder to the male issue shall not be admitted. This possibility, gives a striking proof of the impropriety of departing from established rules of construction.

An objection is then made, that the intervening bequest to the surviving sons, between the devise for life, and that to the issue by implication, prevents the union of the two last mentioned devises. The rule in Shelley's case enlarges the estate for life, into an inheritance, where the devise to the heirs or issue is *mediate* or *immediate*; the former describes the case of the present devises. In Fearn on contingent remainders 25, it is said, that the only difference between the limitation being mediate or immediate is, that in the latter case, the tenant for life takes an estate tail in *possession*, and in the former, he takes the estate tail in remainder, *dependant upon the determination of the intermediate estate*. So that this objection seems to have no weight.

Another point made was, that under the implied limitation to the male issue, they might take as purchasers, since they were to take not in succession in tail, but as tenants in common, in the same manner as the surviving sons were to take. This has been mentioned before, not to have been the testator's intention, or if it had, it was controuled by one of the rules of law, stated to be inflexible, to wit: that a testator could not make his land *descend* to all his sons, instead of the eldest. So that upon the whole, it seems to me, that if there were nothing more in this case, that the point which has been noticed, the court would be compelled to adjudge, that James took an estate tail in remainder, expectant upon the determination of the estate tail to the surviving sons. But tho' I am well satisfied in this opinion, some of the other judges doubt about it, and we thought it unnecessary to decide that point, since admitting that James took such an estate tail in remainder, we are all of opinion against the appellant upon two remaining points.

The first depends upon the devise to the trustee. The trust commences at the death of James, so as not to include the estate for life devised to him; it comprehends the contingent remainders to the surviving sons and to their male issue, and the implied remainder to the male issue of James. Perhaps it goes farther, and extends to all the subsequent remainders, since after the estate for life to Muscoe, a further trust is declared, without naming

naming a new trustee, or without a devise to such new trustee. The *legal* estate in fee therefore, in trust for the surviving sons in tail male, interposes between the estate for life of James, and the implied remainder to his male issue, which is supposed to enlarge the former into an estate tail.

To admit that effect, and to describe the whole interest which James took in the lands; he was tenant for life in possession, with remainder in tail male expectant upon the determination of the estate tail devised to his surviving sons. And we come to consider, what operation the statute of uses will have on this estate under the devise to the trustee.

The statute gives the legal estate to him that hath the use, so that there must be an use, before the statute can operate upon it.

In Powell on Devises 283, it is said, that as to persons *in esse*, the *legal* estate is executed immediately, and as to persons not *in esse*, it vests immediately upon their coming into being *if they come in good time*, otherwise, it goes over to the next remainder man. To apply this. Here was a trust for surviving sons, and for male issue not *in esse*, and *who never came into being*, it being stated, that James never had a son in whom either use could vest. The *good time* therefore, for them to come *into esse*, was expired at the death of James, and the estate either remained in Muscoe as the trustee, (the trust not being executed by the statute, but remaining at common law,) or the estate passed over to him as the next remainder-man, either of which defeats the appellant's title.

But then a question arises upon the act of 1776, whether this was such an estate tail in James, as was by the act turned into a fee simple.

The act operates upon all estates tail in possession, and those in reversion or remainder, after the determination of an estate for life, or lives, *or of any lesser estate*. James's estate has been described as an estate tail in remainder, after the determination of a preceding *estate tail*. It was therefore a *greater estate* than for *life or lives*, and consequently not within the operation of the act, so as to defeat the remainder to Muscoe, now to take effect, as there are neither surviving sons, nor male issue in his way.

So that upon these two grounds to wit, 1st, that the estate at law remained in the trustee for want of a person coming into *esse* in whom the use could vest, or when that event was become impossible, passed over to Muscoe as the next remainder-man, and first *cestui que use in esse*.

2dly, That James being seized of an estate tail in remainder, after the determination of a prior estate tail, is not such a tenant in tail, whose estate is to be changed into a fee simple by the act of Assembly of 1776.

The law therefore is in favor of the appellee, and the judgment of the District Court is to be affirmed.

RICHARDS *against* HOOME.

THIS was an appeal from the District Court of Fredericksburg, reversing an order of the County Court of Stafford, giving leave to the appellant to build a mill on Rappahanock river.

WARDEN for the appellee, objected, that *the record* did not shew that the property in the *bed of the river* was in the commonwealth, or in the appellant, without which, the County Court ought not to have given leave to erect the mill.

LEE and WASHINGTON for the appellant, Contended, that though the person applying for leave to build a mill, must satisfy the court, that the bed of the river is in himself, or in the commonwealth, yet it is not necessary to *state this fact upon the record*; particularly at this day, when an application may be made *ore tenus*, without the formality of a petition in writing. When in cases of this sort an appeal is prayed, all the facts are examined into *de nova* in the superior court; so that the statement of this fact upon the record, could not have availed the person petitioning, since he must still have proved it; neither can the omission of the clerk in not stating the fact upon the record, render such proof unnecessary here. If it had been stated, it might have been disproved in this court.

The court being equally divided.

The judgment was affirmed.

AMBLER *against* WYLD.

IN September 1778, the appellant sold to the appellee, his houses and lots in York town, the price of which was to be

be settled by the valuation of three persons, for that purpose, mutually chosen by the parties; one half of which was to be paid at the time of the valuation, and the other in a year afterwards.

On the 18th of the same month, the referees reported, that the property in the situation, in which it then was, was worth £1000, and signed a certificate to that effect. This was transmitted to Mr. Ambler, who was not present when the valuation was made; but it appears that Mr. Cary, who acted for him, was.

On the 20th of October following, the first payment was made, for which Mr. Ambler gave a receipt, as for so much *current money* in part payment for the above property; Wyld, at the same time agreeing, not to demand a conveyance until the balance was paid.

In autumn 1779, the appellee by an agent, offered to pay the balance to the appellant in paper money, who declined receiving it, saying, he should see Wyld that afternoon.

On the 10th of February 1782, the appellant procured from the persons who had valued the above property, a certificate in the following words, viz: "Some time in the year 1778, the underwritten were called upon by Mr. Thomas Wyld to value the houses and tenements in York town, then the property of Mr. J. Ambler, which he (as we were informed) had agreed to sell the said Wyld, at such a price as disinterested persons should determine the same were worth; agreeably thereto, the underwritten did value the said houses and tenement to £1000; and it being contrary to the laws of the land at that time in force, to make any difference between paper money and specie, we do further declare, that we did then, and do now think, the aforesaid houses and tenement were worth £1000 *specie*." To which paper, the names of the valuers were signed.

The appellant instituted an action at law against the appellee in the County Court of Henrico, sometime in the year 1783. The declaration contained 3 counts; the first of which was upon an *indebitatus assumpsit*, for £600 lawful money of Virginia, due to the plaintiff on the 1st of October 1778, for certain lots and tenements in the town of York. The 2d count was upon a *quantum valebat*, for the same property. The 3d was for £600 like money, laid out and expended for the defendant at the time before mentioned. Plea, non-assumpsit, with leave to give special matter in evidence at the trial. Verdict was given for the plaintiff, and damages assessed to the amount of £374: 1: 7½.

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The defendant moved for a new trial, the consideration of which, was postponed until the next day, when the motion was over-ruled, and judgment entered up according to the verdict. To the opinion of the court upon the motion, the defendant tendered a bill of exceptions, which was sealed, stating, that the jury had without the permission of the court, carried with them into their retirement the above certificate of the 10th of February 1782, which had been offered in evidence at the trial and rejected by the court, because the persons subscribing the same were present in court, and examined as witnesses, whose testimony did not vary from their said certificate. Upon which ground the motion for a new trial was made, but that the same was over-ruled by the court.

From this judgment of the County Court, Wyld appealed to the General Court, where it was affirmed in 1789.

In March 1791, the appellee filed a bill in the *County Court of York*, on the chancery side, stating the above facts, and in addition thereto, that at the trial in Henrico Court, he produced witnesses to invalidate the testimony of the witnesses produced by the appellant, and to prove that the valuers had invariably acknowledged, that they made the valuation in current money and had never thought of specie at that time; but the court refused to permit those witnesses to be examined; that the jury retired, taking with them the certificate of the 10th of February 1782, but without any evidence to prove the tenor of the valuation made in September 1778, the production of which was required by his counsel at the trial, but denied by the appellant's counsel to be in existence. The bill prayed to be relieved against the judgment of the General Court, and to be restored to the amount thereof, which had been paid to the appellant.

The answer insists, that the certificate of the 10th of February was not a new valuation, but an explanation of that formerly made. That this certificate was obtained for the purpose of shewing what had been the real valuation made of the property, by the persons appointed to fix its price, in order to entitle the defendant, to claim the benefit of the fifth clause of the law, fixing the rate of depreciation, which authorized a departure from the general scale established by that act, where the justice of the case required it. That the trial was fair, and the testimony of the three valuers explained to the jury, the estimate they had made of the property in 1778. That the whole question of law and equity was fully before the jury, and having been

been finally decided upon by them, and their verdict approved by the court, the defendant insists that no other tribunal ought to interpose. He admitted that the valuation was not *made* in specie, but the valuers thought it *worth* £ 1000 in specie, and rated the current money at par with specie. He also admits, that the jury by mistake took the certificate with them, but asserts that the whole testimony went to a valuation in 1778, and so he conceives did the certificate.

This answer being replied to, sundry depositions were taken, some of them proving, that the valuers had declared, they made their estimate in *current money* without once thinking of specie. This is acknowledged by themselves in their depositions, in which they state, that they knew of no depreciation, or difference between paper money and specie at the time they made the valuation.

One witness deposed, that he heard one of the valuers declare, that when he signed the certificate of the 10th of February 1782, his intention was, that Wyld should make the second payment of £ 500 equal to the first, which according to the scale of depreciation, would have been £ 100 specie, and that Ambler was entitled to no more. That he heard another of the valuers declare, that he did not believe the property would sell for a £ 1000 in specie, and that the certificate of 1782 was wrong if it mentioned specie.

Several witnesses deposed that the houses when sold were untenable, (having been used as barracks,) and were in a very ruinous condition. That after Wyld had repaired them, they were offered at public sale for £ 500, and that no person would purchase them.

One witness deposed, that at the trial in Henrico Court, the valuers were examined, and declared, that they did conceive the property worth £ 1000 *good money*.

Another witness deposed, that he and two others attended as witnesses for Wyld at the trial in Henrico Court, but their examination was refused by the court, as it would invalidate the testimony of Ambler's witnesses. This witness says little else in his deposition, except, that he had heard one of the valuers declare, that the houses were not valued in specie; that they would not have dared to mention specie, as paper money was the legal circulating medium.

The County Court of York, decreed the appellant to pay to the appellee, £ 395: 11: 7 $\frac{1}{2}$, with interest thereon from the 10th of June 1789, till payment, and the costs. From this decree,

decree, Ambler appealed to the High Court of Chancery, where the following opinion and decree was given, viz: "that
 " if the appellee were injured by the verdict of the jury, and
 " judgment of the County Court of Henrico, stated in his
 " bill, the only mode by which he could regularly obtain redress, was a new trial of the issue between the parties in the
 " action at common law, and consequently, that the decree of
 " the County Court of York, which seems to have thought the
 " principal money recovered by that decree, so much more than
 " the appellant ought to have received from the appellee, is erroneous; and therefore this court doth reverse the
 " said decree. But this court supposeth, that if certain facts
 " now appearing by the testimony in this cause had been known
 " to the jury who tried the issue, or to the court who rejected
 " the motion for a new trial, either the former might not have
 " found such a verdict, or the other, if they had found it, might
 " have awarded a new trial: and is of opinion, that, although
 " the County Court of York perhaps had no power to award
 " such new trial, this court retaining the cause may now proceed in it, as if it had been originally commenced here; and
 " therefore this court doth direct the said issue to be tried again
 " before the said County Court of Henrico, and the verdict
 " thereupon to be certified to this court. And the appellee here
 " in court doth consent, (without which consent, the new trial
 " would not have been awarded,) that if the damages which
 " shall be assessed upon such trial, exceed the damages assessed
 " on the former trial, which may be the event, this court may
 " decree him to pay the excess, and award execution against
 " him for the same."

From this decree Ambler appealed.

The PRESIDENT delivered the opinion of the court.

Neither of the parties appear to have been dissatisfied with the valuation of the property made in 1778, nor is it disputed, but that this was a paper money contract, and so understood by the parties; for besides the other proofs taken notice of at the bar, it appears that on the 20th of October, as soon probably as the parties met together after the valuation, Mr. Ambler received £500 the first installment, without objection, as according with the principles of the valuation *then recently made*. In autumn 1779 when the other payment became due, the depreciation was so visibly great, as to make a more serious impression upon parties to former contracts; and tho' no rule was then established, by which to graduate the scale of depreciation, every person was
 struck

struck with the injury which would be sustained by a payment according to the nominal amount. Mr. Ambler therefore, might well think himself justifiable in evading the receipt of the £500 nominal money, which Mr. Wyld then offered to pay him.

This was not a legal tender by Wyld; nor could it be relied upon as such; and tho' the General Court may (as it is said) have adopted some rule as to its effect under a branch of the 5th section of the act of 1781, yet neither does that apply here, since the subject was submitted to a jury who were to judge for themselves.

Here the matter rested until the 10th of February 1781, when the act for scaling paper money contracts had passed, fixing a general rule for adjusting those contracts according to the rate of depreciation at the time they were made, but allowing a departure from that rule in particular cases, so as to meet the ideas of the parties at the time of the contract. Mr. Ambler supposed that an enquiry into the relative value between paper and specie, as understood by the valuers at the time they made their estimate, was proper and necessary, in order to furnish an equitable rule for adjusting this contract. His application therefore for this explanation, was by no means inconsistent with the fair character which that gentleman has always supported.

The paper of the 10th of February was not a new valuation, but an explanation of the former. As such indeed it was somewhat oracular, and the court would perhaps find it difficult to develope its meaning, if it were necessary to do so. However, Mr. Ambler supposed that it entitled him to claim £500 specie, and he demanded that sum of Mr. Wyld, who on the other hand conceived, that this nominal sum was to be reduced by the legal scale of September 1778, which would bring it to £100 only. To settle this great difference in opinion, the parties go into the County Court of Henrico.

It was truly observed at the bar, that the issue in that suit left the matter of controversy open to a full and fair enquiry on the merits, and if on the trial, all the testimony offered by the parties had been admitted, and after hearing it the jury had decided as they did, no good reason could have been urged for a new trial. But this was not the case; evidence was freely admitted on one side, and without a colour of reason was rejected on the other. The trial then was not fair and equal, nor such as ought to conclude the parties. And since the injured party did not, and now cannot obtain relief in a court of law, it can

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only be afforded by a Court of Equity, and may properly be so, as innumerable precedents will prove.

The County Court of York had original jurisdiction in equity, not to award a new trial in *Henrico Court*, but to direct an issue to the same effect to be tried at its own bar. But instead of doing this, that court by some rule of calculation, the principles of which are concealed from our view, make up an account, and decree Mr. Ambler to refund £ 395 : 11 : 7½ and costs. This was unquestionably erroneous, and was properly reversed.

Whether the Chancellor could assume original jurisdiction on this appeal, if York Court had it not, is a point which need not be decided, since this was not the case. He certainly had upon the reversal, a right to retain the cause, and might direct the issue to be tried at his own, or at any other bar.

It was pressed by the appellant's counsel, that if a new trial were directed, a special direction should accompany it, pointing the jury's inquiry to the value of the property at large, independent of the valuation fixed upon it by the persons who had made the estimate.

This would be highly improper. It was not the intention of the legislature to let men loose from their contracts, but to allow a departure from the established scale in cases where it was necessary, in order to meet the real contract of the parties.

The counsel need not be alarmed about objections to the form of proceeding, since being an issue out of chancery, and to be certified there, all forms in the proceedings at law will be out of the question.

Decree affirmed.

JAMES

JAMES BURNSIDES, Appellant,
against
 ANDREW REID, SAMUEL
 CULBERTSON, & THO- } Appellees.
 MAS WALKER.

AND
 ANDREW REID Appellant,
against
 JAMES BURNSIDES Appellee.

THIS was an appeal from a decree of the High Court of Chancery. The case, was,—Andrew Culbertson having made a settlement on a piece of land called Culbertson's bottom in the year 1753, or 1754, was compelled through fear of the Indians to leave it; after which, he sold it to Samuel Culbertson, who also lived on and improved it, and he too in 1755 was compelled to leave it from the same cause.

Although the two Culbertson's were for many years prevented from returning to this settlement on account of the savage enemy, yet Samuel Culbertson constantly asserted his claim to this land, and made frequent attempts to return to it.

In 1775, Thomas Farlow, having acquired the settlement right of two men by the names of Butcher and Gatliff to this land, being 355 acres, purchased the same from the Loyal company, paid the consideration money, and procured the same to be surveyed on the usual terms of that company. The survey was returned to the appellee Thomas Walker, (the company's agent,) and Farlow took a certificate thereof in order to obtain a grant so soon as one could issue. The appellant Burnside having purchased the right of Farlow to this land, received an assignment thereof.

In 1782, Burnside, as assignee of Farlow, who was assignee of Butcher and Gatliff exhibited his claim to this land, before the commissioners appointed by the act of 1779 to adjust disputes between litigant settlers, and claimed under a survey made by Farlow in 1775, for settlement in 1772, for 355 acres. The commissioners allowed him 400 acres (including the said 355 acres) for his settlement in 1792 together with 600 acres pre-emption.

tion adjoining. At the same session of the board of commissioners, Reid, on behalf of Culbertson exhibited his claim for the same land, asserting Culbertson's right of settlement in 1754, which was rejected by the commissioners, who decided the right in favor of Burnside.

Burnside states in his bill, that he laid his claim by survey before the commissioners; but they refusing to allow the validity of surveys under a company, gave the preference to *prior settlers*, in consequence of which, he was *obliged* to claim as for a *prior settlement*, or lose his land. At the time that these claims were before the commissioners, the claims of the loyal company (amongst others) were pending in the court of appeals, and in 1783, the surveys made under the companies were established and declared valid, where legally made.

In October 1784, Reid, as attorney for Culbertson, entered a caveat in the General Court against a grant issuing to Burnside, stating in his petition, that at the trial before the commissioners, he was prevented by unavoidable accidents from producing testimony in support of his claim, which but for those causes, it was in his power to have furnished, and praying for a reconsideration of the case.

The General Court granted a hearing, and after the examination of witnesses and of the circumstance of the cases, Culbertson's claim was sustained, the sentence of the commissioners set aside, and 400 acres for settlement, and 600 acres pre-emption were adjudged to him.

To prevent a grant from issuing in consequence of this adjudication, and to compel Thomas Walker the agent of the company to yield his consent to a grant to the said James Burnside of the land in question, Burnside filed his bill in the High Court of Chancery. The bill amongst other grounds of equity states, that the plaintiff was precluded in the General Court, from bringing forward his claim *by purchase from the company*, because the determination of the commissioners had been given on a claim for *prior settlement*, and because the plaintiff's survey was in possession of the defendant Walker, and could not be produced. The injunction prayed for by this bill was granted till further order.

Pending this suit, and before answers were put in, Burnside having in the year 1786 procured a survey to be made of 1200 acres of land including the land in controversy, and having obtained a certificate thereof, paid to the said Thomas Walker the purchase money, and procured an order to the register for a patent, which
actually

actually issued, founded on the judgment of the commissioners for 1000 acres, (though it had been set aside by the General Court) and 200 acres by virtue of a land office treasury warrant. To obtain a repeal of this patent, Reid filed a cross bill against Burnfides.

Both causes coming on together, the judge of the Court of Chancery pronounced the following opinion and decree viz :
 "The court is of opinion that Burnfides, after obtaining an injunction to stay execution of a judgment by the General Court against him, having procured a survey to be made, and a grant to himself to pass the sea, of land, to which land the title of Samuel Culbertson was asserted by that judgment, and which according to the judgment would have been secured to him by a grant, if Burnfides had not prevented it, was guilty of a fraud, because the register of the land office, if he had known such a judgment to have been rendered, by which he was ordered to issue a grant of that land to the said Samuel Culbertson, ought not to have issued, and therefore probably would not have issued the grant to Burnfides. And the court is also of opinion that Reid, on whom the right of Samuel Culbertson hath devolved, is not barred of relief against Burnfides, by the decree and order of the Court of Appeals, on hearing the claims of Walker and Nelson, not only because a claim under the survey for Farlow, which Burnfides in his bill suggests to be the foundation of his title, doth not appear to have been established by the decree and order of the Court of Appeals, and could not be legally established, so as to bind the right of any who were not parties in that proceeding, but, because the grant to Burnfides was founded, not on that survey but, on a survey certified to have been made for himself, in January 1786, by virtue partly of an entry, on a certificate from the commissioners for the district of Washington and Montgomery counties, for 400 acres, dated the 10th of September, 1782, which certificate of the commissioners, with their adjudication affirming the right of Burnfides, was annulled by the General Courts judgment aforesaid. And now the court would have pronounced such a decree as in its opinion, if what followeth had not happened, ought to be made—a decree nearly like that which was pronounced in the case between James Maze, plaintiff, and Andrew Hamilton & William Hamilton defendants; but that decree hath been reversed by the Court of Appeals; & this court, from that reversal, supposeth, perhaps erroneously, the opinion of that honorable court to have been, that, by the order of council, granting
 "leave

"leave to the Greenbrier company to take up 100,000 acres of land,
 "lying on Greenbrier river, northwest and west of the Cow-pasture
 "and Newfoundland, all lands within those limits, if they must
 "be called limits, were appropriated, so that the company or
 "their agent had power to survey and sell any parcel, which they
 "should chuse, of such land, although another man had settled on
 "the parcel before the surveying and selling, and although the act of
 "General Assembly, passed in the year 1779, had declared to be just,
 "that those who had settled on the western waters, upon waste and
 "unappropriated lands, for which they had by several causes been
 "prevented from suing out grants, under such circumstances, should
 "have some reasonable allowance for the charge and risk they had
 "incurred, and that the property so acquired should be secured to
 "them; the honorable court seeming to have understood that, by
 "the terms *waste and unappropriated lands, to which no other per-
 "son hath any legal right or claim*, the act intended lands
 "which the company had not chosen to survey, after, as
 "well as before, they had been settled; whereas some,
 "who have observed that the surveys made by orders of
 "council, and confirmed by the act, are surveys of waste and un-
 "appropriated lands likewise, think the application of the term,
 "*unappropriated*, in the case of lands surveyed by orders of coun-
 "cil, to lands not settled before the surveys, would be found cri-
 "ticism; especially the act having dignified the settlement with
 "the emphatical appellation of property, property acquired, and
 "acquired at charge and risk means of acquirement generally
 "esteemed meritorious; and think the words *lands, to which no
 "other person hath any legal right or claim*, more restrictive than
 "the words *lands unappropriated*, which comprehend lands to
 "which no other person hath any right or claim, whether legal
 "or equitable; and the honorable court seeming to have under-
 "stood that the act, by the terms *upon lands surveyed for sundry
 "companies &c. people have settled, &c.* In the seventh section,
 "designed to include lands surveyed as well after, as before, the
 "settlements; whereas some commentators conceive that the in-
 "terpretation, which confineth the words to surveys prior to the
 "settlement, is not inconsistent with the rules of grammar, with
 "the intention of the legislature, or with the principles of natu-
 "ral justice. And this court supposeth the opinion of the honor-
 "able court to have been, that where a settler of land, surveyed after
 "his settlement by virtue of the company's order of council, had
 "obtained a grant of the land, including an additional quantity in
 "right of pre-emption, one, who was a prior settler, recovering
 "the

" the settlement from the grantee on that principle, shall not re-
 " cover with it the pre-emption land; whereas others think that
 " he, who recovereth in right of priority, ought to be in the con-
 " dition in which he would have been, and consequently ought to
 " have the pre-emption, to which he would have been intitled, if
 " the posterior settler had not obtained the grant. And this court
 " also supposeth the rights of the loyal company, under whom
 " Burnfides in the principal case claimeth, and the territo-
 " rial limits of whose order of council are not more definite than
 " those of the other company, to be no less extensive, and not less
 " to be preferred to the rights of settlers, than the rights of that
 " other company; on these suppositions, this court, in order to
 " such a final decree as at this time is believed to be congruous
 " with the sentiments of the Court of Appeals, doth direct that
 " a survey be made of the 400 acres of land, for the settlement by
 " Andrew Culbertson, which may be laid down as either party
 " shall desire, to enable the court to decide between them on the
 " propriety or reasonableness of the location; that the patent of
 " James Burnfides be also surveyed and laid down, to shew how
 " much it includeth of the 400 acres; and when this shall be ad-
 " justed, the court doth adjudge, order and decree, that Burn-
 " fides do convey to Reid the inheritance of so much of the 400
 " acres as shall be found to lie within the bounds of the said pa-
 " tent, with warranty against himself, and all claiming under him,
 " and deliver possession thereof, upon Reid's paying to him, at the
 " rate of three pounds per hundred acres, for the quantity so to be
 " conveyed, that as to those 400 acres the bill of Burnfides be
 " dismissed; and, as to the residue of the land contained in the pa-
 " tent, that the bill of Reid be dismissed; but Reid is neverthe-
 " less to be at liberty to proceed to survey the 600 acres of land
 " for his pre-emption, if he can find land to satisfy the same,
 " without interfering with the said patent, or any other prior
 " claim."

From this decree both parties appealed, each from so much of it as partially dismissed his bill

CARRINGTON J. delivered the opinion of the court.

The act of 1779 gives a preference to original settlers, and so did the loyal company. The act grants to such settlers 400 acres including their settlement, and a pre-emption of 600 acres adjoining, if such lands can be found, to which no other person has a legal right. The Chancellor is mistaken when he likens this to the case of Maze and Hamilton.* If the cases were alike, as he states them to be, this court would have established the present decree without a dissenting voice; and notwithstanding the *criti-*

* See APPENDIX.

cisms that have been passed upon that decision, this court upon a revision of that case consider it to have been determined in strict conformity with the law, and agreeably to the principles of equity. But how was the case of Maze and Hamilton? Maze's settlement was in 1764; Hamilton's not until 1770. Maze constantly asserted his claim of settlement right. In June 1775, Hamilton surveyed 1100 acres including Maze's settlement, and pending the dispute got out his patent. The act of 1779 established the right of prior settlers, and gives *pre-emption* when *vacant lands are to be found adjoining*. Though in that case the settlement was Maze's, yet the *adjoining lands* which would otherwise have been for *pre-emption*, were not vacant, having been surveyed by Hamilton under the authority of the Greenbrier company, anterior to the act of 1779. This court therefore considered that Maze had a right to his settlement, & Hamilton, having a right prior to that, under the law of 1779, was entitled to the remainder of his patent, and so determined it, with liberty to Maze to survey his *pre-emption wherever else he could find vacant land*, and reversed the decree. What is this case? Culbertson proves his prior settlement incontestably, in which is included Farlow's survey. Burnside's, not till 1786, (long after the determination in favor of Reid in the General Court,) made his survey, and fraudulently obtained his patent for the settlement, and for *pre-emption* in the vacant lands adjoining. Until then, we hear of no title in the adjoining lands in any body. Therefore his patent was founded upon a rotten foundation, (so far as it included the settlement and *pre-emption*,) it being upon the judgment of the commissioners, which was declared void by the General Court. An attention to dates will point out the distinction between the two cases. In the case at bar, the *pre-emption* of Samuel Culbertson is made to yield to the patent of Burnside's, altho' the lands adjacent to Culbertson's prior settlement were vacant at the time of the judgment of the General Court in 1784, establishing Culbertson's settlement and *pre-emption*. Burnside's survey was not made, nor his patent obtained till 1786, and that by fraud, imposing on the agent of the loyal company the commissioners certificate in 1781, which had been vacated by the General Court.

The decree of the High Court of Chancery is therefore erroneous in this, that after setting aside Burnside's patent for fraud, so far as it comprehended the lands adjudged by the General Court in 1784 to Samuel Culbertson for his settlement right, it makes the *pre-emption* claim of the said Culbertson, founded on
the

the said judgment, yield to the patent of the said Burnfides, which was not obtained until 1786, upon a survey made in that year.

The decree is to be reversed, and it is now decreed that a survey be made of 400 acres for Culbertson's settlement right, and 600 acres adjoining, which may be laid down as either party may require, to enable the Court of Chancery to determine as to the reasonableness of the location; that the patent to Burnfides be also surveyed and laid down to shew how much it includes of the 1000 acres. And when this shall be adjusted, the court doth adjudge &c. that Burnfides do convey to the said A. Reid the inheritance of so much of the 1000 acres as shall be found to lie within the bounds of Burnside's patent, with warranty against himself and all claiming under him, and deliver possession thereof upon his paying to the said Burnfides at the rate of £3 per hundred acres, for the quantity so to be conveyed: That as to those 1000 acres, the bill of Burnfides be dismissed, and as to the residue of the lands contained in the patent, that the bill of Reid be dismissed, and that Burnfides pay costs in each suit in the High Court of Chancery.

Judgment Affirmed.

CASES

ARGUED AND DETERMINED

IN THE

COURT OF APPEALS

IN

THE SPRING TERM OF THE YEAR,

1795.


 JAMES HENDRICKS & JESSE TAYLOR

against

JOHN DUNDASS.

IN consequence of the opinion of this court (see *ante* Vol. I. p. 92) Dundass moved the County Court of Fairfax to quash the first execution and replevy bond, principally, because the former issued without his order, or permission, and was unfairly executed. The County Court quashed the execution and replevy bond, from which an appeal was entered by Taylor, after having stated the grounds of it in a bill of exceptions, made part of the record. The substantial parts of the bill are, that it appeared in evidence to the court, that Dundass was in Philadelphia at the time the execution issued. That it was done at the request of Taylor, but in the presence of, and with the assent of Mr. Lee, (who had been attorney for Dundass, in a suit in chancery brought to injoin the judgment obtained at law by Dundass, but who was not his attorney in that cause,) and that of Mr. Hepburn, the partner & father in law of Dundass; but that the debt in question belonged exclusively to Dundass, having been due to him before either of the above connections took place with Hepburn, who had no authority from Dundass to transact this business. That after Dundass returned from Philadelphia, he gave notice to Taylor, and to the attorney of Hendricks, that he should appeal to the County Court of Fairfax from the opinion of the commissioners who took the replevy bond, and should move the court,

court, to adjudge the security taken by them insufficient, and further to do whatever the law should authorise in that behalf, to the end, that the said debt and costs might be satisfied. But that no motion was made, or other proceedings had under that notice. That the agent of Taylor who pursued Hendricks into the county of Cumberland, informed the commissioners, that James and John Hendricks had left Alexandria greatly in debt, and were considered as bankrupts, but did not inform them that he was the agent of Taylor.

The District Court of Dumfries affirmed the judgment of the County Court, after examining witnesses, whose testimony is also made part of the record. The amount of the evidence is, that the person, who was sent into Cumberland County by Taylor with the execution, went with the permission of Hepburn, and that Hepburn and Dundas never intermeddled in the separate business of each other.

CAMPBELL for the appellants. I doubt the power of any court to set aside a replevy bond, on account of the insufficiency of the security, unless the mode of proceeding, by an appeal from the opinion of the commissioners, which is specially authorised by the act of Assembly, be pursued.

At all events I contend, that a bond taken under the direction, and with the approbation of those who by the law are constituted Judges for this purpose, will be considered as valid until the contrary appear. No presumption can lie against the acts of persons thus constituted, and if a court undertake to annul them, the reasons ought plainly to appear.

This record exhibits but a single ground, and therefore it will be supposed, that none other was urged, or proved; it is, that the execution issued without authority.

This is a mere dispute about a fact, and therefore the court must decide according to the ordinary rules of evidence. The mind cannot, after a view of the testimony stated in the record, withhold its assent from this truth. That the execution was ordered by persons having special, or general authority from Dundas to act as they did. The Attorney, and the father in law and partner, in the absence of the plaintiff, place themselves in his stead; from the relative situation of the parties, such a power is fairly to be presumed. But that which confirms this presumption to the satisfaction of the most incredulous mind is, that after Dundas returned home, instead of disavowing the act as unauthorised, he recognizes it, and takes steps, not to avoid the proceedings, but to affirm the execution, and to obtain better

ter security under the act of 1787.* Now if the original act was not his, he should not have taken it up where he found it, but should have protested against it from the beginning. This solemn recognition does completely conclude him now from denying the authority of those whose act he has ratified.

WASHINGTON for the appellee. An inferior court ought always to be considered as having decided right, unless the contrary appear upon the record to the appellate court. This is a principle universally admitted. The County and District Courts have quashed the replevy bond; and the appellant complains that they have erred. It becomes him then to point out the error, and to prove it by the record. He attempts it, by *presuming* that Mr. Lee as the attorney, and Mr. Hepburn as the partner and father in law of the appellee, were clothed with authority; he does not pretend that it is proved, nor does it follow as a necessary consequence from the connexion with the appellee. Even if the attorney who obtains the judgment, may order the execution, (of which I much doubt) yet surely one not concerned in the action at law, can have no authority to do it. Neither can a father in law, or partner, dispose of the property belonging *exclusively* to his son in law, or partner. It is contended that presumptions are inadmissible to defeat a forthcoming bond. This is very true, and with less reason ought they to be received against a judgment which is a more sacred thing.

But it is said, that Dundass has ratified the act. If by mistaking his right; if by misconceiving the law, he supposed that the remedy first contemplated was the best, or perhaps the only one, is he therefore to be concluded, tho' upon better advice he determined not to proceed in that, but in some other mode? Unquestionably not. The court of Fairfax was satisfied upon this point, or else they would not have given the judgment they did. It does not appear that all the evidence which was given, was spread

* Ch. 7, § 5. "In any case where the creditor, his agent or attorney shall be dissatisfied with the insufficiency of the security admitted by such valuers, it shall be lawful for such creditor to appeal to the next court to be held for the county or corporation, thereupon giving notice thereof to the debtor or his attorney; and if such court shall be of opinion that the security so admitted was insufficient, the execution upon which such security was admitted shall be deemed and taken as a lien upon the goods and chattels of such debtor, and shall not be discharged but upon payment of the debt and costs, or tender of other sufficient security satisfactory to the court, and moreover the bond and security given by such debtor shall remain valid until such counter security be given."

spread upon the record. Presuming therefore in favor of the judgment, as is always done in favor of a general verdict, (which would not have been found unless the essential facts had been proved,) this court must affirm the judgment, so far as it depends upon the weight of evidence.

The court were not bound to state the reasons of their judgment. The party objecting to it, was bound to furnish an appellate court with the same lights to decide by, as the inferior court had, and therefore should have stated the whole evidence. The consequence of his not having done it is, that if this court were to reverse the judgment, they would do it in the dark, because the inferior court may have quashed the bond for fraud in taking it, and this court might say they did right, if they had the same evidence before them that that court had.

CAMPBELL in reply. I do not say that any one fact in this cause proves the authority by which this execution issued. But as the whole question turns upon the weight of evidence and the conviction it brings to the mind, it is fair to contend as I have done, that the relative situation of Lee and Hepburn with Dundas, supported by his after recognition, is conclusive to prove that they acted by authority.

LYONS J. It is unnecessary to decide, whether the execution in this case issued by sufficient authority or not, the opinion of the court being with the appellee upon another point. It may suffice to observe, that the permission obtained from Mr. Hepburn and Mr. Lee, was merely intended as a favor to Taylor, and ought not to have turned to the disadvantage of the person on whose account they acted. This tho' not expressed, must have been understood.

The facts stated upon this record certainly exhibit as strong a case as can be imagined, to warrant the interposition of the court, whose justice was so glaringly attempted to be eluded and abused. The execution is carried by the agent of Taylor into a distant county in pursuit of Hendricks, who, with his property, was removing from the reach of his creditors. It is there levied upon his property, and the commissioners are informed that both James and John Hendricks had left Alexandria greatly in debt; were there considered as bankrupts, and were clandestinely removing from thence. Notwithstanding this caution, they restore the debtor his property upon his giving a twelve-months bond, and accept his brother as security who was then absconding with his property, and as well as the principal was considered as being insolvent. Such conduct in the commissioners, if it deserve

not the epithet of fraud, was certainly highly improper and unjustifiable. Tho' *they* might have been made liable, yet a shorter and more effectual method was, for the court, whose process had been thus abused, to quash the execution. That such a right belonged to that court, cannot be questioned. Were it otherwise, it would be in vain for courts of justice to render their judgments. If this charge against the commissioners were unfounded, the appellant has had time enough to justify their conduct. The insolvency of the security was suggested by the appellee, yet no attempt has been made to disprove it. Upon the whole, we are clearly of opinion, that every court hath a perfect right to watch over the execution of its judgments, and where its process hath been irregularly, or fraudulently executed, to quash it, as being the best and speediest mode of doing justice, and that in this case, the court had sufficient ground to afford this summary interposition.

Judgment affirmed.

JAMES FERGUSON & two others,
against
M O O R E.

THE appellee directed a distress to be made upon the property of M'Rae his tenant, for the rent of a house, situate in the town of Petersburg, by the serjeant of the Court of Hustings of the said town, which being replevied for three months, a bond was executed by the appellants, and was returned into the *County Court of Dinwiddie*, and on motion of the landlord, judgment was rendered thereon in the same court. The defendants below, filed exceptions to the judgment, and assigned the following objections to it. 1st, That the bond was not executed by M'Rae, the tenant in possession, nor the owner of the goods distrained,—2d, That the court had no jurisdiction over the cause, it appearing from the face of the bond that it was taken by the serjeant of the corporation of Petersburg.—3d, That James Ferguson one of the obligors, was the original lessee of the premises, and assigned his interest in the term to John M'Rae the present tenant in possession, without the privity or consent of the lessor.

Upon an appeal to the District Court, of Petersburg the judgment was there affirmed. To this judgment, a superiadeas was awarded by this court.

MARSHALL for the appellant. It is a principle founded in much reason, and has often been approved in this court, that

where a statute authorises a summary remedy unknown to the common law, the provisions of such a statute must be literally and strictly pursued. The act of Assembly (see the old body of laws p. 202) directs the bond to be given by the *tenant or owner of the goods*, and where that is the case, a judgment may be obtained upon such bond, *by motion*. But the bond in question is stated to have been executed by persons not coming within this description, and is therefore not entitled to the benefit of this law.

As to the question about jurisdiction, there is more difficulty. The law requires the bond to be returned, but does not point out the court to which the return is to be made. Upon the reason of the case, I should suppose, that it ought to be made to that court, to which the officer taking the distress belongs, because if it might in this case be made to Dinwiddie County Court, it might be made to any court in Virginia. Such a construction is too unreasonable and absurd to be admitted for a moment. Upon this record, the court cannot judicially know that Petersburg is in the county of Dinwiddie, and therefore the argument *ab inconvenienti* is as strong, as if in truth the bond had been returned to Monongalia Court, and the judgment rendered there. But if the court can properly take notice, that Petersburg is in the county of Dinwiddie, I should then contend, either that the bond should have been taken by the officer of Dinwiddie County Court, or as the case has happened, that it should have been returned to the corporation court of Petersburg. There can be no doubt, but that this latter court had jurisdiction of the case under the act of 1787, if the parties lived within the limits of the corporation.

WICKHAM for the appellee. I admit, that if this were a common law right taken away by the act of Assembly, the principle laid down by Mr. Marshall in discussing his first point, might be correct. Such is the case of a security, who is permitted by a particular law of this state to obtain a judgment upon motion against the principal obligor, for money which he has been obliged to pay for him. In such a case, the principal is deprived of a trial according to the forms of the common law, and may therefore with propriety insist upon a strict adherence to the law, affording this summary remedy.

But in the case now under consideration, the bond given upon replevying property distrained, has its origin in the act of Assembly, and is provided for the benefit of the *tenant*. Without such legislative interposition, the property would have been subject to an immediate sale.

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The second objection is to the jurisdiction of the court where the judgment was rendered. The act of Assembly does not require that a distress should be made by an *officer*, much less by the officer of a particular court. The landlord may personally, or by his bailiff take a distress as well under the act of 22, Geo. II, C. 16, as he might have done if that law had never been made.

A constable is not the officer of a court, and yet no one will doubt, but that he may levy a distress for rent. Why is the bond to be returned to one court more than another? The property may be distrained in a county remote from that in which the land lies, as where it is fraudulently removed for the purpose of defeating the landlord's remedy. Would it be contended in such a case, that the officer must return the bond to the court of the county in which the goods were found, because he belonged to that court? But the motion could not be made in that court, because it is local in its nature, of course it could be made nowhere. The act of 22, Geo. II, C. 16, which authorises the taking of a distress in such a case out of the county in which the land lies, does not speak of an officer at all, but authorises any person (for that purpose empowered by the landlord) to seize and sell the property.

The serjeant in this case may have been the special bailiff of the landlord for any thing that this court can know.

It is not necessary in order to enable the tenant *to replevy*, that the distress should have been made by an officer. If indeed a *sale* had been made, it might perhaps have required the aid of the sheriff.

It is observable, that the *remedy by motion* upon bonds of this kind, is not given by the act of 1748, which authorises the taking of them, but by that of 1769, C. 4, §. 5; and in this law, the officer is not required to return the bond at all. But if this were otherwise, yet process may be returned by a sheriff to a court, of which he is not the officer.

It is objected that the bond was not executed by the tenant in possession, nor by the owner of the goods distrained. I do not find that this is necessary. The law authorises the replevy, upon the tenant giving *good security* to the officer. This he may do without executing the bond himself. Suppose an infant to be the tenant. He could not give a bond, which could bind him; it would be void by law, and yet if he did not do, what the law would declare to be invalid if done, he would be deprived of the benefit of replevying, unless he were permitted to give

other

other security. So too, the tenant might be absent when the distress was taken, and yet a friend might be willing to relieve his property by becoming his security. But if it were necessary that the bond should be executed by the tenant in possession, the assignment having been made without the privity of the landlord, M'Rae cannot be considered as the tenant in possession.

Mr. RONOLD on the same side, observed, that the act making use of a common law term, it must be construed according to the understanding of the common law; and if so, a bailiff is an officer in a case like the present.

MARSHALL in reply. If a distress had been made at common law, and a bond given similar to the present, no motion could have been made to recover the amount of it, though at common law the landlord might have immediately sold the property. But the remedy which the party has pursued, is merely statutory, and being a summary one, the law must be strictly pursued.

It is true that the act of 1769 gives the remedy by motion on bonds of this sort, but it was the act of 1748 which authorised the taking of them, and that law directs them to be returned. The original lessee, by the assignment, departed with all his interest, and his assignee became the tenant in possession, and could alone give the bond.

LYONS J. The first objection made by the appellant's counsel to the judgment in this case is, that the bond was not executed by the tenant in possession, nor by the owner of the property distrained. The court are of opinion that M'Rae cannot be considered as the tenant in possession, the assignment having been made to him without the privity or assent of the lessor. The lessor is not bound thereby, but may still consider the original lessee as his tenant, and therefore it is sufficient under the law, that the bond was executed by him.

The second objection is to the jurisdiction of the County Court of Dinwiddie. It is true, that at common law, a distress might be levied by any private person authorised by the landlord for that purpose, but it is equally true, that such person so appointed, had no right to sell the property distrained, or to take a replevy bond. The power of selling is given by statutes in England, and by an act of Assembly in this state, and can only be done by an *officer*; that is, by one duly qualified as such. And whether that officer be a sheriff, or a constable, they are both appointed by the court, are considered as being persons of credit and of good character, and by such a person, the bond so taken is to be returned. But then the question is, to what court is the

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bond

bond to be returned? The answer is an obvious one, and results from the nature of the case. It should be to that court to which the officer belongs, of which he is the representative, and whose orders and process he is bound to obey and execute, or to the court of that county, in which the land lies. This must be a general rule, unless in some special case where the law hath otherwise directed, and which on that account will form an exception. This case comes properly within that rule, tho' no precept issues from any court.

Consider what would be the situation of both parties, were the law otherwise. If the sheriff may return the bond to a court whose officer he is not, he may return it to any court in the commonwealth, which might prove as inconvenient to the landlord, as to the tenant. If the bond be delivered to the party, the same reason requires that the motion should be made in the same court which would have had jurisdiction, in case the sheriff had returned it according to the rule before mentioned.

The above observations are intended to shew the necessity of confining the return to some particular court, and is a complete answer to the supposed case of a distress made in a different county, from that in which the land lies, in which case, the bond should be returned either to the court of the county in which the land lies, or to that to which the officer belongs.

Judgment reversed.

CURRIE *against* DONALD.

IN an ejectment brought by the lessee of the appellant against the appellee, in the Court of Hustings of the city of Richmond, the appellee at the trial, to shew that the title was out of the appellant, offered in evidence a deed from the appellant to Hunter Banks & Co. whereby he conveyed to them in fee simple the demised premises.

The deed being objected to, and the objections over-ruled by the court, a bill of exceptions was filed, stating that the deed was neither *indented*, nor had it been *recorded*; also, that no proof of its *delivery* was given except the following, to wit: one of the subscribing witnesses did not recollect that it was delivered, but was sure that he should not have attested it unless he had seen the appellant sign and seal it, or heard him acknowledge that he had done so. Another of the subscribing witnesses did not
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recollected the delivery, but is sure that he should not have attested it, unless he had heard the appellant acknowledge it as his act and deed, for the purposes therein mentioned, as it was his constant custom to require such acknowledgment. The third subscribing witness was out of the country, and the fourth interested, but their hand writing was proved. A witness who had not attested the deed, deposed, that the deed was delivered to him by some person to examine, but whether by Currie or Hunter he could not remember, and he being of opinion that there were inaccuracies in it, retained it (for the purpose of drawing a new deed) until it was brought into court at the trial—the bill states that this was all the evidence given respecting the delivery of the deed.

The jury found a verdict for the defendant, and upon an application to the District Court of Richmond for a superedeas, the motion was refused, from which an appeal was prayed to this court.

CAMPBELL for the appellant. The deed was improperly admitted as evidence to prove the title to be out of the appellant for three reasons. 1st, That it was not recorded. 2d, That it was not indented—and lastly because it was not delivered.

The first objection, as well as the second depends upon the construction of the act of 1745, C. 1. The first section declares “that no estate of inheritance, or of freehold, shall pass, alter, or change from one person to another, unless by deed in writing, *indented, sealed and recorded,* in manner therein after mentioned.” The manner is, that it should be proved by three witnesses, or acknowledged within a certain time in the General Court, or Court of the County wherein the land lies. The 4th section declares all deeds not recorded according to the directions of this law, void as to subsequent purchasers and creditors, but that the same shall be good between the parties, tho’ not recorded according to the directions of the act. Now, where the law annexes certain qualities to a thing, they are a part of the thing itself. A deed of feoffment at common law passed no interest without livery of seisin; but when livery was made, it related back to the feoffment. So recording, which hath been substituted in the room of livery, is essential to pass the estate out of the grantor, and without it no estate is vested in the grantee. The two sections of the law must be so construed as to avoid contradiction. To say that the first, renders all deeds ineffectual which are not indented and recorded, and that the 4th makes them valid, tho’ those requisites are not observed, is a construction which unnecessarily produces indecent

cent hostility between the two sections. It is the business of the court then, to give such a construction, as to reconcile the various parts with each other. By the first section, *no estate passes without recording*; by the 4th, the deed if not recorded *within the time prescribed*, is void as to *purchasers and creditors*, but not as between the parties, if *recorded at all*, tho' *not within the time*. Yet until it be recorded, *no estate passes*. The cases determined under the statute of 27 H. 8 C. 16, which is substantially the same as the law in question, are in point. Until inrollment, no estate passes, *Shep. Touch. 220*. So the same book proves, that unless the deed of bargain and sale be *indented*, nay written on parchment, nothing passes, because the statute requires those things. As an evidence that the legislature meant what I contend they have expressed, the 12th section of this very law gives validity to deeds, which before that time had not been indented and recorded in pursuance of the act of the 9th of Ann, C. 13, which was in the very words of this law as to those requisites.

The next objection is, that the deed was not delivered. The whole evidence being stated upon the record, the validity of the deed becomes a question of law. Delivery is sometimes a question of fact, sometimes a question of law. If it be delivered to a third person to examine, or as an *escrow*, there is in *fact* a delivery, but in *law* no estate passes thereby. Now in this case, a delivery was not proved by the evidence stated in the bill of exceptions, and it appears that that was all the evidence on that point.

RONOLD for the appellee. The objection as to the deed not having been recorded, is fully settled as I conceive by the case of *Turner vs. Stip*, (ante Vol. I, P. 319,) in which the court determined, that a deed was valid between the parties, tho' improperly admitted to record, or not recorded at all.

The next objection is, that the deed was not indented. But this is not necessary to pass an estate, 2 *Blac. Com.* 300. Nay it is not even necessary in order to produce an estoppel, for a deed poll will answer the purpose, 1 *Morg. Els.* 169. The inconvenience, of the novel doctrine now contended for would be infinite. If strictly pursued, it would defeat the effect of almost every conveyance made in this country. For if indenting be necessary, we must refer to the common law for the mode, and we shall there find, that it was performed by cutting through letters, 2 *Blac. Com.* 299, a practice which has never been pursued in this country. We are to consider the intention of
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the deed, and even if the appellant's counsel be right in his construction of this law, so that the deed in question cannot take effect as a deed of bargain and sale, yet it may operate as a covenant to stand seized, *ut res magis valeat quam pereat*. Or the deed may operate as an *estoppel* to the claim of the appellant.

The third point is, that the deed was not delivered. A delivery may be made either by words, or by acts, *Shep. Touch. 55*. It will be valid if made to a stranger for the use of the grantee, *Ibid. 56*. Now the evidence in this case seems to be complete. One witness has declared, that unless the grantor had acknowledged the deed to be his act for the purposes therein mentioned, he would not have attested it, because it was his constant practice to require this solemnity. But what I consider as conclusive, is the attestation. All the witnesses have there declared that the deed was signed, sealed and *delivered*, in their presence. I contend that those witnesses ought not to be permitted to contradict their attestation, even if their evidence went to that. It would be extremely mischievous, if a witness, after giving authenticity to a paper by his signature, were permitted to deny the fact which he has thus authenticated.

MARSHALL on the same side. As to indenting, it is certainly unnecessary at common law to pass an estate, and tho' spoken of in the first section of the act of Assembly, it is dispensed with by the fair construction of the 4th; which declares the deed valid between the parties, though it want this solemnity. This is the more evident, by connecting this with the 3d section of the law which speaks of deeds poll. There are deeds spoken of in the 4th section which most certainly need not be indented, and then it is said, "*but the same*" as between the parties shall be valid." What same? The answer is, deeds poll as well as deeds indented.

As to the delivery, it is a mere question of fact. The court cannot say, what weight of evidence shall be sufficient to prove it. If the deed be antient, slighter evidence will satisfy a jury of the fact, than if it be a recent one. It cannot be expected that a man shall preserve his testimony to any indefinite period of time, when he may be called upon to prove this fact. It is only necessary for him to satisfy a jury of the fact, and in this case the jury was satisfied.

I shall say nothing upon the subject of recording, since that point has been already settled in this court, by the case of *Turner and Strip*.

WASHINGTON in reply. It is evident that there is no way to reconcile the apparent inconsistencies of the act of 1748, but by giving to it this construction, viz: the deed must be recorded at some time or other, in order to *pass an estate of freehold*; but as to creditors and subsequent purchasers, it must not only be recorded, but it must also be recorded according to the directions of the act; but as between the parties, it need not be recorded according to the directions of the act, but then *it must be recorded*. By this construction, the act is rendered consistent, and each clause and sentence of the law will have an effective meaning. Upon this distinction, the present case differs from that of *Turner and Stip*; in that, the deed *was recorded* though not *agreeably to the directions of the act*; in this, it was not recorded at all.

As to the indenting:—It is true, that at common law, this piece of solemnity is not necessary to pass an estate; but this is no answer to the objection. The statute positively requires it, by declaring that no freehold estate shall pass but by *deed indented*. Is there any case which proves, that a solemnity thus imperiously required by statute can be dispensed with? On the contrary, do not the cases cited by Mr. Campbell, decided upon the statute of inrollments, clearly prove, that a solemnity thus required, must be performed in order to give efficacy to the deed? As to the argument, that it is good as a covenant to stand seized, though it should not take effect as a deed of bargain and sale, there is certainly nothing in it, because the *deed itself* is void, and being so, it can under no name pass an estate.

The 4th section does not dispense with *indenting*, tho' it does with *recording in the manner prescribed by the 1st section* as between the parties to the deed. To repeal the express declarations of the first, by any implication growing out of the 4th section, would be repugnant to every rule of construction.

Upon the point of delivery, the arguments on the other side prove too much. They would go to establish what no professional man would directly avow; and that is, that a delivery is not necessary at all. I admit that in this, as in all other cases, the best evidence is to be given which the nature of the case will admit. It was so in this case. But then certain questions of law arise upon that evidence. Is the *acknowledging* of a deed equal to a *delivery* of it? Let it be that the former is sufficiently proved; but is that enough? Most clearly it is not.—Again, was the delivery to the witness to examine it, such a delivery as would pass the estate? Certainly not, but the contrary. Yet all these points were decided by the court, and as we say improperly.

LYONS J.

LYONS J. delivered the opinion of the court.

The first objection which I shall notice is the want of indenting. It is contended that the first section of the law requires this solemnity, and that the 4th does not dispense with it even between the parties. But the answer is, that the 4th section would be nugatory if all these and the other requisites were necessary, for if the deed be void for the want of them by the first section, it was unnecessary to declare it void in the fourth.

What is it, that shal be binding between the parties? The answer is, all conveyances without restriction. The apparent object of the law was to secure creditors and subsequent purchasers, and not to affect the parties. This is more particularly proved by the 10th section of the law, which requires memorials of all recorded deeds to be transmitted to the secretary's office to be there registered.

But suppose indenting were necessary, this deed begins "This indenture." It is signed, sealed and acknowledged as a deed indented, and the grantor cannot afterwards deny it. It is to be taken most strongly against him. What would be the consequence, if proof of indenting were always necessary? The originals cannot always be produced, and in the copy it cannot appear. The most trifling degree of indenting would be sufficient, and this might be worn out, so as not to be perceived. In the strictest pleadings they are called deeds of *Indenture*, not deeds *indented*. The cases all prove, that indenting is unnecessary. Judge Blackstone in his commentaries says, that it is now of little other use than to give a name to the deed. This case in principle may be compared to that of *Jones & Temple vs Logwood*, (See ante Vol. 1. P. 42) where this court determined, that a scroll was equivalent to a seal of wax, or of any thing capable of impression, and impressed. This decision was founded upon the real justice of the case and the custom of the country; that the scroll being adopted by the party, and acknowledged to be his seal, made it his seal in fact. So here, the party having acknowledged that this was an indenture, he has made it so as to every legal purpose. A deed beginning "This indenture," tho' not in fact indented, may be given in evidence. *Morg. Ess. 169.*

The second objection is to the proof respecting the delivery. The parties have declared it to be sealed and delivered, and this is attested by the signature of 4 witnesses who could not afterwards have been permitted to disprove it. This delivery we must consider as absolute, because if it had been intended as an
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escrow, it ought to have been so stated. Neither is there any proof that it was so intended; but the contrary is strongly to be inferred from the evidence. It would have been sufficient to have entitled the deed to be recorded, if it had been offered.

The last objection is, that it was not recorded. The case of Turner and Stip is conclusive upon this point, for tho' that deed was admitted to record, yet it was improperly admitted, and was consequently in the same situation as if it had not been recorded at all.

The cases cited by the appellant's counsel upon this point do not apply, because there is nothing in the statute of inrollments similar to the provisions contained in the 4th section of our act of Assembly.

Order of the District Court affirmed.

SHELTON *against* BARBOUR.

THIS was an appeal from the District Court of Charlottesville. It was an action of trespass, assault and battery & false imprisonment, brought by the appellee, who had been held by the appellant as a slave, in order to try his right to freedom. The pleadings having put this point in issue, the appellant the matter, offered in evidence a transcript of a verdict and judgment in the former General Court, between the mother of the appellee and Robert Harris, under whom the appellant claims, by which verdict it was found, "that the plaintiff was the slave of the defendant." The appellant's counsel offered this *as conclusive evidence of his title*, but the court being divided in opinion sent the verdict to the jury as *circumstantial evidence only*, and in no other manner. To this opinion the appellant excepted and the verdict being against him, he appealed.

MARSHALL for the appellant. There is no rule better established than this, that a verdict may be given in evidence between the same parties, or between those, who are *privies* to the verdict, and where the matter in issue in both suits were the same. *Bull. Ni. Pri.* 232, 233. In this case, both the appellant and the appellee were privies to the verdict found in the general court, the former, claiming in right of his mother, and the latter, claiming such title as the defendant in the former suit could convey to him. Freedom or slavery was the substantial matter in issue in both suits. This point was once decided in the former

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mer General Court, and the principal was there laid down, that a verdict finding the mother to be free, should be conclusive evidence of the freedom of the child, in an action brought by the child, against one claiming under the defendant in the first suit.

RONOLD for the appellee. If the court had decided that the verdict was not conclusive evidence, they would have done right, 1st, because the whole record in the former suit was not produced, but only the verdict and judgment, from which it could not certainly appear to the court, what was the essential matter in dispute upon the former trial; and 2dly, because from the very nature and reason of the thing, it would have been unjust to effect the appellee's title by a verdict, to which he was not a party. For he might have had it in his power to produce better evidence of his right to freedom than his mother could, which indeed it appears he did, from the verdict being in his favor. Upon a trial touching a right of common, it is clear that a verdict against one commoner, would not be evidence in an action brought against another, for the second may have some other, or better title, than the former. So in this case, the mother might have been a slave, and yet the son might be free, for he might have been liberated, and the record not stating the whole evidence, it does not appear that the son relied upon the same title that his mother did.

But I contend, that the court did not decide whether the verdict should be considered as conclusive evidence or not. The judges were divided upon that point, and therefore the court has not erred, even if the verdict were conclusive evidence.

COPLAND on the same side. In addition to the arguments used by Mr. Ronold, I would ask whether a verdict ought not to be as conclusive against the master as against the slave?

WARDEN on the same side, insisted that the case of Tom and Jenkins decided in this court (See ante Vol. 1, P. 123) if looked into, would be found in a great measure to decide this question.

WASHINGTON in reply. The principle of law laid down by Mr. Marshall has not been controverted otherwise, than as being an unreasonable rule. I shall therefore confine my observations to the objections made to the rule upon that ground. The reason, why persons who were parties to the former trial, or who claim under them, are bound by a verdict rendered upon the same question, is, that there may be an end put to law suits; for it would be inconvenient if men's titles once decided, should

be always at sea, and subject to the hazard of many trials, when loss of testimony or other casualties might happen.

But it is objected, 1st, that the son might have it in his power to produce better evidence than the mother, This would apply with equal force in all other actions where the plaintiff or defendant had miscarried in a former suit, and would furnish an apology for endless litigation upon the same subject, however frequently it may have been decided.

2d. The son might have had a title which his mother had not. If the fact were so, then the case would have been out of the rule contended for, which is, that a verdict can be given in evidence only between such as are parties or privies to it; and where *the trial was had upon the same point*; but if the plaintiff had another title, why did he not shew it? He may yet shew it, tho' the judgment should be reversed.

Lastly, it is said that the court did not decide, that the verdict *was not conclusive evidence*. The record itself will best explain the decision of the court. It states, that "the court suffered the said record of a trial to go to the jury as *circumstantial testimony only, and in no other manner*," which was certainly deciding, that the jury were not to consider the verdict as conclusive, but only as circumstantial evidence: and to his opinion, the exception was taken.

CAMPBELL for the appellee. The case cited from Buller 232, does not support the rule of law contended for. It declares that the verdict *may be given in evidence* but does not assert that it is to be considered as conclusive. The reasoning of the author proves, that such was not his meaning, for he says "the verdict in such a case is a very *persuading evidence*." In this case the verdict was given in evidence, and therefore the very thing was done which the authority requires.

The record not stating that the appellee's title was the same with his mother's, this court will not presume it, for the purpose of rendering the judgment below erroneous. It is true, that the question in both suits was the same, but it no more follows that the title was the same, than that every question which respects the same parcel of land must be the same.

Since the law, as well as the best feelings of the human heart favor liberty, the rule contended for ought rather to be moderated than extended in the present case.

The

The PRESIDENT delivered the opinion of the court. To discharge this case of Tom & Jenkins cited at the bar, let it be observed, that the only question there was, whether the court did right in admitting the hearsay evidence of old people then dead, to prove that the plaintiff's ancestors were Indians; this court approved the opinion of the District Court. In that record there is a paper which seems to want a name, & appears merely to contain the arguments of one of the counsel, and the opinion of one of the judges upon a point which this court has since sanctioned; to wit, that there was a time when the law of this country authorized the making slaves of Indians taken in war within the then colony; that under that law, many Indians were made slaves, and their descendants have continued in bondage. But that some time after, that law was repealed, from which time, no *American Indian* could be made a slave. But this court took no notice of that paper, as it did not come up as an exception to the opinion of the court, but was permitted (at the importunity of the counsel) to be made part of the record.

In that case too, this court thought that the deposition of Mr. Belfield, to prove that a verdict had been given in another suit between Richard Vena and William Hammond was inadmissible, since the record itself ought to have been produced.

It has been contended in this case that liberty is to be favored. This is true, but the court cannot on that, or on any favored subject infringe the settled rules of law. It was also objected, that the plaintiff might have had it in his power to produce better testimony than his mother did. In the first place, it is not presumable that he knew more than his mother did respecting her title to freedom, and in the next, the law indisputably supports the rule contended for, that between parties and privies to the former suit, the verdict is *conclusive evidence*. The reason of the rule has additional strength in this case; for since the act of Assembly declaring that children shall be bond or free according to the condition of the mother, the verdict, which found the mother a slave, was *conclusive evidence* to prove that the son was so. The case mentioned by the appellant's counsel in the General Court was like the present.

It was argued, that the appellee might have been manumitted. If so, he certainly ought not to be precluded from proving it, nor will the opinion which this court will give preclude him. The judgment must be reversed for error in the court's not admitting the record as *conclusive evidence*, to prove the plaintiff a slave. The cause is to be sent back for a new trial

with

with a direction to this effect, unless the plaintiff can shew that he or his mother were manumitted subsequent to the first verdict.

BROCK & others *against* PHILIPS.

THE case was—John L. Lewis by his will devised, that as much of his land should be sold as would be sufficient to pay his debts, and he empowered *his executors thereafter named*, to sell and make conveyances for the same. He also devised to his wife one half of his land remaining after his debts paid, and the residue of his estate, and the reversion of the land given to his wife, to go to his children. The appellant Brock and two others were named executors, the former of whom alone qualified. The executor sold a tract of land for payment of the debts, and supposing that the amount of the sale would be sufficient for that purpose, he delivered to the widow a moiety of the remaining land. Afterwards finding it necessary to sell more land for payment of further debts, he disposed of the reversion of the land allotted to the widow, by public sale, which was purchased by George Stubblefield another of the appellants, and he selling to Beverley Stubblefield the other appellant, a conveyance was made by Brock to B. Stubblefield.

The prayer of the bill is to set aside the conveyance, and for a division of the land according to the will, which was decreed by the High Court of Chancery, from which this appeal was prayed.

WASHINGTON for the appellant. There are but two questions, worthy of consideration; for the charge of fraud in the bill being denied in the answer, and supported only by one deposition without corroborating circumstances, it will not be considered as true. They are 1st, Whether one of the executors alone could sell? 2d, Whether the executor acted properly in selling the reversion?

It is true, that a power given to two, cannot be executed by one. The distinction is between a power devised to three *by name*, to be exercised by them in their *individual capacities*, and one which is given to them in their *official capacities*. In the former, all must join in executing the power, because a fewer number than those appointed will not answer the description. But in the latter case, if two only qualify, they are still the executors, and answer the description. In this case, the power is given to the executors *virtute officii*. 2d,

2d, The widow, was not bound to take *a moiety of the remainder* under the will. She was entitled to, and might claim *a third of the whole*. It does not appear to the court, that the part allotted to her was more than a third, and consequently, the executor, who had a right under the will to sell for payment of debts, could not do otherwise than sell the reversion, the widow being lawfully entitled to retain the possession during her life. It does not appear that there was any other land to sell except this reversion.

MARSHALL. If I thought there were any doubt respecting the want of authority in the executor to sell the *reversion* of this land, I should question the right of one executor to sell at all. But considering the other point as being too clear to admit of doubt, I shall confine myself to it.

The executor was bound to pursue the power delegated to him. The widow, was entitled under the will only to a moiety of the land not disposed of in payment of debts. She did not demand her dower, but accepted of a moiety of the land which remained after the first sale had been made. She cannot therefore claim under, and against the will. The executor, instead of selling the reversion of the moiety allotted to her, should have sold the other moiety, and even if it were necessary to sell this, or a part of it, the absolute right and present interest should have been sold, since the widow was entitled to no part under the will, till after the debts were paid. The consequence of what has happened is, that the children have been extremely injured by having their property sold under an incumbrance, and on that account at an under value.

WASHINGTON in reply. If the executor ought to have sold other land, it may be a reason to charge him with misconduct, but the purchaser ought not on that account to suffer. An executor by law ought not to sell slaves whilst there is personal estate; but yet if he were to do it, the title of the vendee could not be impeached, any more than if he had purchased from the executor a specific legacy, whilst there were other assets sufficient to pay the debts, *Mead vs Lord Orrery &c.* 1 Atk. 235.

LYONS J. delivered the opinion of the court.

It is unnecessary to decide the first point made in this cause, since the court feel no difficulty in affirming the decree upon the second. There can be no doubt, but that the executor has exceeded his power in selling the reversion of the land in question. The case of a person purchasing slaves, or a specific legacy from an

an executor whilst he has other assets to pay debts, is not like the present. The executor by law has a right to the possession of slaves, and of personal estate, and a right to sell them. But he has no right to sell lands, unless under a special authority. A purchaser therefore of land, from an executor, is bound to look for, and to understand the extent of that power, and consequently the principal *caveat emptor* strictly applies in such a case. It is otherwise as to personal estate. The executor instead of selling the reversion of this land ought to have sold the other moiety which was unincumbered.

Decree affirmed.

TURNER *against* MOFFETT.

THIS was an appeal from the District Court of Dumfries. Moffett sued out a *capias* against Turner and Chilton which was served upon Turner. The declaration was upon an assumpsit against Chilton only. Turner and Moffett by consent referred the cause to arbitration under a rule of court, and agreed that the award should be made the judgment of the court. An award was made in favor of the appellant for £ 132 : 5 : 9, for which judgment was entered, and also for the costs.

MARSHALL for the appellant, Contended, that the judgment was erroneous for two reasons, 1st, because it is against Turner, when by the appellee's own shewing it appears, that Chilton, and not Turner was the debtor. The declaration is against Chilton only, and there is no charge against Turner. In the case of Picket & Clayborne, this court determined, that a confession of judgment cured the want of a declaration. But he knew of no case where the reference of a suit and an award made thereupon, had been considered as sufficient to cure the want of a declaration, much less to cure a defective one as this is.

2dly, The judgment does not pursue the award, for the former gives costs, which the latter does not.

WASHINGTON for the appellee. In answer to the first point relied upon the case of Leftwich and Stoval (ante vol. I, p. 30) which seemed to conclude all discussion upon the question.

As to the 2d point, the judgment is for the very sum awarded by the arbitrators, and the costs are given by the court, as the necessary consequence of the judgment.

MARSHALL.

MARSHALL. The costs, are not the necessary consequence of the judgment's being for the appellant; for suppose the arbitrators had awarded that the appellant should pay the costs; the judgment must in this respect have pursued the award although the judgment for the debt was in his favour.

The COURT gave no opinion upon any of the above points, observing, that the award is stated to be made in pursuance of an order of reference, the *date* of which is misrecited, and that the judgment upon the award is therefore erroneous. Whereupon Washington moved for and obtained a certiorari, upon a suggestion of diminution.

The judgment was reversed at the succeeding term for this error.

TURBERVILLE *against* SELF.

REPLEVIN, in the County Court of Westmoreland brought by Self the defendant in error. Avowry for rent arrear. Plea *nil debet*, and concludes as usual to the country, but the issue is not joined by a *simiiter*. At the trial, the defendant gave in evidence an award of arbitrators made *since the distress was taken*, but respecting accounts subsisting between the parties, *prior thereto*, in order to shew, that he did not owe any thing to the avowant. This being objected to as improper evidence, and being admitted by the court, a bill of exceptions was filed. The avowant offered in evidence to destroy this demand of the plaintiff's, a bond of his for 5000lb of tobacco, which had been assigned to him *as appeared from the endorsement*, sometime in 1785, long before the distress was taken, but he did not *prove* notice of the assignment to the plaintiff, nor did he otherwise than by the endorsement, prove the precise time when the assignment was made. The court rejected this evidence, to which an exception was taken. Verdict for Self the defendant in error. This judgment was affirmed in the District Court of Northumberland, to which judgment a superseas was awarded by one of the judges of this court.

The objections made to the judgment by *Washington* for the plaintiff in error were 1st, That no issue was joined in the cause.

2d, That the plaintiff ought to have set forth the award specially in his plea, that the avowant might have it in his power to

to impeach it, and that for this reason it was improper to give it in evidence on the general issue.

3d, That the court ought to have admitted as an off-sett against the award, the bond of the defendant in error which had been assigned to the plaintiff.

MARSHALL for the defendant, In answer to the first point, relied upon the case of *Brewer vs Tarpley* (ante vol. 1, p. 363) as conclusive.

The second objection if a good one for the reason assigned, would equally prevent one *bond* from being off-sett against another, which (it cannot be denied) may be done under the general expressions of the act of Assembly respecting discounts. Though the award is made posterior to the taking of the distress, the debt was created long prior to it. The award does not create a debt, but only ascertains one already existing—it was therefore proper evidence.

The answer to the third objection is, that the time of the assignment not being proved, it might have been made subsequent to the distress, and if so, was improper evidence to justify an act which was originally tortious. For if nothing were due (which there was not, since the *debt* due from the avowant exceeded the *rent* due to him,) when the distress was taken, the seizure was unwarrantable, and could not be rendered lawful by a subsequent act tending to destroy the off-sett of the tenant against the demand of rent. The date of the assignment endorsed on the bond, is no proof of the real time when that assignment was made.

The court affirmed the judgment.

BRYDIE *against* LANGHAM.

THE appellant having recovered 4 judgments in the County Court of *Fluvanna* against the appellee, sued out 4 several writs of *ca. ja.* against his body, directed to the sheriff of *Henrico county*, where he was taken and committed to jail. The court upon motion, quashed these executions with costs including an attorney's fee, assigning the following reason for their opinion: "That the said writs were illegal, because Langham was a resident of *Fluvanna county*, and the said executions were levied upon him in the *county of Henrico*, whither he had gone at the time the said writs of execution were levied, and it not appearing,

pearing, that he had removed his property out of the county of Fluvanna."

The appellant excepted to the opinion of the court, because the following evidence was determined to be sufficient to prove that notice was given of this motion. A notice in writing was proved to have been delivered to the appellant, stating that a motion would be made on a certain day of the next court, to quash four executions issued from the clerk's office of Fluvanna court, against him the said Langham, to satisfy Alexander Brydie, assignee of William Galt & Co. and one other execution issued from the same office, to satisfy Alexander Brydie & Co. which executions issued on the 6th of August, and were made returnable to the succeeding October term, all of which executions were contrary to law.

The appellee also proved by a witness, that he had heard a collector of the appellant's say, that he had understood that motions were to be made at this court to quash the above executions.

The judgment of the County Court was affirmed in the District Court of Charlottesville, where it was carried by appeal. From this judgment, an appeal was granted to this court.

COPLAND for the appellant. Until the act of 1748. C. 8, no writ of execution could issue from one County Court directed to the sheriff of another County. By this law § 20, it is enacted, that where judgment is rendered in any County or inferior court, for debt, or damages, and the defendant shall remove himself *and his effects*, or shall reside out of the limits of the jurisdiction of such court, the clerk is authorised to issue any writ of *fi. fa.* or *ca. sa.* directed to the sheriff of any county, where the defendant, or debtor, or his goods shall be found. Now it is evident, that the fair construction of this law is, that if the defendant remove himself *or his effects*, execution may go into any county where his person or effects are to be found. If it were otherwise, the defendant might easily evade the provisions of the law, by removing himself, and leaving effects of small value behind him. Besides, it does not appear in this case, that the appellee had any effects at all, in Fluvanna, and the court cannot presume he had. The record states, that it did not appear he had removed his effects. But it should have been proved that he had not removed them. If the law be taken literally, it would follow, that if the defendant has effects in any other county than that, in which he resides, a *fi. fa.* may issue to that county.

MARSHALL for the appellee. There can be little doubt about the true construction of this law. The removal contemplated by the legislature was a permanent one; it must be a complete abandonment of the county in which the defendant resided. The evidence of such a removal, is the carrying with him the bulk of his property. The leaving of a small part behind, would be considered as a mere evasion, and would not avail the party. The enquiry in such a case must always be, whether the removal was a substantial one, or a mere going out of the county with an intention of returning; and upon the evidence of the one, or of the other, the propriety, or impropriety of issuing the process to a different county, must always depend.

The record leaves no room for doubt in this case, that the defendant had not removed himself with a view to abandon the county of Fluvanna.

THE COURT affirmed the judgment.

GOODWIN,

against

TAYLOR, Executor of Williamson.

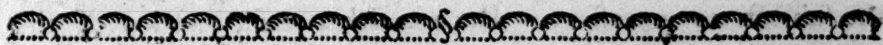
THOMAS WILLIAMSON by his will dated in 1787, devised as follows, viz. "I give to my daughter Elizabeth Clements the interest of £4000 in government funds during her life, and at her death, I give the interest of the above money, one fourth to each of my grand-children S. Cocke, Elizabeth Clements, Frances Clements and John Clements, and at their decease, the principal and interest to be disposed of by them to their heirs, in such proportions, as they by their wills respectively may direct, and in case of the death of my grand-daughter Sarah Cocke without issue, I give her part to my grand-daughter Elizabeth Clements."

Elizabeth Clements the daughter of the testator, by deed duly executed, released to the plaintiff Goodwin and to his wife Elizabeth Clements her daughter, and the grand-daughter of the testator, all her right and title in and to the interest of £1000 of the said certificates. The grand-daughter died in the life-time of her mother intestate, and the plaintiff as her administrator filed his bill in the County Court of Southampton, to recover possession of £1000 of the said certificates.

The

The court decreed the defendant to pay and deliver to the plaintiff £1000 of the certificates in the public funds, bequeathed by Thomas Williamson to Elizabeth the late wife of the plaintiff.

From this decree an appeal was prayed to the High Court of Chancery, where it was reversed and the bill dismissed; from which an appeal was taken to this court, where the decree of the High Court of Chancery was reversed, and that of the County Court affirmed.



C A S E S
ARGUED AND DETERMINED
IN THE
COURT OF APPEALS
IN
THE FALL TERM OF THE YEAR,
1795.

COLLINS *against* LOWRY & Co.

THIS was an action on the case brought by the appellees against the appellant in the District Court of Northumberland, and at the trial of the issue, the deposition of a witness was read by the plaintiff, to which the defendant objected, and being over-ruled by the court, he filed a bill of exceptions stating, that a witness proved, that he had shortly previous to the Term, seen a gentleman from Alexandria, (at which place the deposition was taken,) who informed him, that the deponent had not long before that, sailed for Europe, and had not returned, and that this was all the evidence in the cause. The record does not state, whether the deposition was taken *de bene esse* or in chief; or whether notice had been given to the defendant of the taking of it,

WASHINGTON

WASHINGTON for the appellee contended, that the evidence of the witness accounting for the absence of the deponent, was the best which could have been obtained, and that in cases of this sort, it was the practice to admit hearsay evidence to account for the absence of the witness who had given a deposition.

The PRESIDENT. If the deposition were taken *de bene esse*, the evidence offered to excuse the absence of the witness was defective; if it were taken in chief, no proof upon the subject was necessary. But in either case, notice of the taking of it ought to have been given to the defendant, and as none is stated in the record, the judgment is for that reason erroneous and must be reversed, unless the appellee's counsel supposes he can shew that notice was given, and that the deposition was taken in chief, and prays a *certiorari* for the purpose, which if asked for, will be granted.

The appellee's counsel declined taking a *certiorari*, and the judgment was reversed.

Note; after the PRESIDENT had delivered the opinion of the court, Washington moved to dismiss the appeal, no appearance having been entered for the appellant.

BY THE COURT. You might have dismissed the appeal before the record was opened, but it is now too late.

BERNARD *against* BREWER

THIS was an appeal from a judgment of the District Court of Northumberland, affirming *with costs* an order of the County Court, giving leave to the appellee to build a mill upon a certain stream, the bed whereof belonged to himself, as well as the land on one side thereof.

MARSHALL for the appellant, stated the following errors in the record.

1st, That no notice appears to have been given to the appellant of the application to the court for the writ of *ad quod damnum*. The record states, that the acre sought to be condemned was the property of the appellant, and the act of Assembly expressly requires in such a case, that notice of the motion at least ten days previous to the making of it, should be given to the proprietor.

This

This law, as well as all others, which takes away from individuals in a summary manner, any portion of their property, must be literally and strictly pursued.

2dly, The inquisition upon the writ of *ad quod damnum* was taken by the *deputy* instead of the high sheriff. This being a judicial and not a ministerial act, could not according to the principles of the common law be performed by a deputy. The act of Assembly requires the *sheriff* to do it, which must mean the high sheriff.

3dly, No notice appears to have been given to Bernard of the taking of the inquisition. The law requires the sheriff to give notice to the proprietor, or to his agent, (as in the case first mentioned) if neither of them were in court at the time the order was made, of the day appointed by the court for taking the inquisition. It is true, the return of the sheriff is "that in pursuance of the writ he had impannelled a jury and proceeded *in all things as the said writ required*," and that the writ commanded him to give notice; but in cases of this sort, nothing ought to be left to intendment. It should have been stated in express terms that the notice was given. The court should be unequivocally assured, that the party whose property is to be taken from him, had an opportunity of defending his right. From the literal exposition of the return made by the sheriff, it would seem, that he proceeded according to the command of the writ *after he had impannelled the jury*, whereas the giving of notice ought to have preceeded it.

4th, The law requires the inquisition to be returned to the *next succeeding court*. Now this is returned to the June court, whereas the next succeeding court was in May.

WARDEN, for the appellee, admitted, that if the notice required to be given of the motion for the writ of *ad quod damnum*, could be in any manner useful to the proprietor of the land, the want of it would be error.

But this could not be the case, since the law directs the court to award the writ upon motion, and seems to consider the proper time for contestation to be at the return of the writ. So that if the appellant had had notice, he could not have opposed *the issuing of the writ*, if, as he had supposed, the court had no discretion to grant, or refuse it.

But admit that notice was important, the appellant has not stated the want of it upon the record, and therefore, the court will presume the judgment below to be right, unless the contrary appear.

The

The second objection he said was more serious, as the law must be admitted to be as stated by *Mr. Marshall*. The only difficulty is to decide, whether in this case, the sheriff acts *judicially* or *ministerially*? He was inclined to think, that he acted in the latter capacity. His duty is pointed out by the law. The jury are to make the enquiry, and he is in no instance called upon to exercise the functions of a judge. Besides, by the act of Assembly, the *sheriff* is to execute *all process* to him directed, either himself, or by *deputy*. This writ may properly be called the process of a court within the meaning of the law.

In answer to the third objection, he relied, that it was then too late for the appellant to complain of want of notice, when the record states, that *he appeared*, and contested the writ and inquisition.

The fourth objection he said was founded upon a mistake respecting the times when the sessions of this county court are held.

FLEMING, J.—The first objection stated by the counsel is, that ten days previous notice of the motion for the writ of *ad quod damnum* does not appear to have been given to the appellant.

All laws, which interfere with private rights, and which authorise a mode of proceeding unknown to the common law, ought to be strictly complied with.

If the record stated that the appellant *was present and made defence*, the objection might be gotten over. But as this does not appear to have been the case, I am of opinion, that the first objection made to the order is sustainable. It will be unnecessary to give any opinion as to the other objections, if the court should agree with me in opinion upon this point.

LYONS, J.—I have always been of opinion, that the greatest strictness is required in proceedings, not warranted by the regular forms and principles of the common law. That in such cases, an exception from the rule, "that what is done in a court of record, shall be presumed to be rightly done," is proper. On the contrary, nothing is to be presumed, and it should plainly appear that the proceedings were regularly conducted. These, I say, have been the sentiments, which I have always entertained upon this subject. But I have been over ruled by the decisions of this court, where a different principle has obtained, and therefore, submitting to the authority of those decisions, I have been led to consider in this case, how far the principles which they establish, will apply to the first point made in this cause.

It was argued by the counsel for the appellee, that the notice of the motion for a writ of *ad quod damnum* was not important, as it stood connected with the substantial justice of the case, since the granting of the writ, could not have been contested by the appellant; and that the record shewed, that the appellant afterwards appeared, and defended the motion. If I could discover that the appellant contested the merits of the subject in dispute, I should upon the authority of former decisions in this court, (which in this respect, admit no difference between cases of this sort and those carried on in the forms of the common law,) consider it as a waiver of all objections to the forms of proceeding, and of course, that the failure to give notice of the motion for the writ, could not afterwards be alleged by him as a cause for reversing the order. This court has decided, that after an appearance and defence made upon the merits of the case, the unsuccessful party shall not be permitted to object to any part of the proceedings, of which in an earlier stage of the cause, and before the trial upon the merits, he might have availed himself; as in the case where no issue has been made up. But in this case, it does not appear that the appellant contested the motion of the appellee upon the merits, but only the writ and inquisition. This is what he now contests; what he then had a right to contest, separate from the merits. And therefore nothing can thereby be presumed to be waived.

I do not think that there is any weight in the last objection. The conduct of the sheriff in returning, or in not returning the writ and inquisition to the proper court, ought not to affect the parties. If there had been negative words in the law making the inquisition void unless returned by a particular time, the direction must have been strictly pursued; but this not being the case it was merely directory to him.

I am also of opinion, that the court had no right to award costs in this case, and that in this respect there is error.

THE PRESIDENT. I agree in opinion with the other Judges who have gone before me, that if we could be satisfied from the record, that the appellant *appeared*, and contested the motion upon the merits of the case, he could not afterwards avail himself of the want of notice in the first instance, to defeat the order. A defence made upon the merits would, I think have amounted to a waiver of all objections to the form of proceeding. But the appearance after the inquisition was returned, and contesting merely the writ and inquisition, does not cure the error which the want of notice of the motion in the first instance had occasioned.

Judgment and order reversed.

PHILIP M'RAE,

against

RICHARD WOODS.

THIS was an appeal from the High Court of Chancery, in a suit instituted there, by the appellee against the appellant. The bill states, that the plaintiff in the year 1769 had a lottery, the highest prize in which was some improved lots in *Charlottesville* and a tract of land, which property, in the scheme of the lottery was estimated at £440. That *Roderick M'Rae* purchased two tickets, *Henry Mullens* one, to which the plaintiff added another, the whole forming a joint property, in which *Roderick M'Rae* owned one half. That one of the partnership tickets (No. 69) drew the highest prize, and was therefore entitled to the property above mentioned. But the ticket so soon as its good fortune was known, was forcibly taken from the said *Roderick M'Rae* by the defendant *Phillip M'Rae*, who claimed the entire benefit of the prize. That the plaintiff and *Mullens* having sold their interest in the prize to *Roderick M'Rae*, the plaintiff conveyed the whole property to the assignee of *Roderick*. That about fifteen years after this, the defendant commenced a suit against the plaintiff at law, and in the absence of the plaintiff's witnesses, who could have proved the tortious manner in which the plaintiff acquired the possession of the ticket, a verdict was rendered against him for £451:18:4 damages, for the *whole value* of the ticket. The bill prays an injunction to the judgment at law.

The answer states, that half of the ticket in question was purchased by *Roderick M'Rae* for the defendant, the day before the drawing, and that after it was known to have been fortunate, it was delivered to the defendant by the said *Roderick*. That the defendant never claimed more than one *half of the prize* drawn by this ticket.

The evidence, as to the right of *Philip M'Rea* and the manner of his obtaining possession of the ticket, is extremely contradictory.

The subject of dispute was submitted to arbitration by the two *M'Rea's* (as appears by the testimony of some of the arbitrators,) and a decision was given in favor of *Philip M'Rea's* title to one half of *Roderick's* interest in the prize. One of the jurymen who tried the cause deposes that his intention was to give

give damages for the whole value of the ticket. Another jurymen deposes, that the jury gave to the appellant Philip M'Rea, damages, for the interest which Roderick M'Rea held in the ticket. The declaration filed in the action at law claims the whole ticket, and the verdict is general, "that the defendant did assume upon himself as the plaintiff hath declared against him and ass-ss the damages to £ 451 : 18 : 4."

THE CHANCELLOR upon the hearing of this cause, directed the issue between the parties in the action at common law, to be tried again; from which decree the defendant appealed.

MARSHALL for the appellant. I shall object 1st, to the decree in toto; or if I am wrong in that, then 2dly, to so much of it, as directs a trial of *the right* of the appellant to any part of the ticket in dispute.

Upon the first point I contend, that the bill ought to have been dismissed. The equity stated is, that the appellant was entitled to *no part of the ticket*, but having obtained the possession of it tortiously, he thereby acquired *prima facie* an evidence of right, which on account of the appellee's want of testimony at the trial, he was unable to controvert. The equity now set up, (namely, that the appellant was only entitled to a *fourth of the ticket*;) not being stated in the bill, he had no opportunity given him of controverting it by his answer, nor was it necessary for him to do so; and therefore, whatever proof the appellee might produce as to the extent of the appellant's interest, it was improper for the Chancellor to decide upon it. The appellee might have amended so as to put in issue the point for which he now contends; but not having done so, he is confined to the equity stated in the bill.

The court are not now at liberty to say, that the verdict is wrong so far as it gives to the appellant the value of a moiety of the ticket. All the testimony in the cause proves the right of Philip M'Rea to a moiety, unless it be the award, which is made upon the principles of accommodation, and to which the appellee having objected, it would be improper to allow it any weight in the cause, by considering it as evidence of the rights of the parties.

The Chancellor therefore erred as I conceive in setting aside the verdict. The trial before the jury was a fair one. The appellee does not even charge in his bill that he was surprized, otherwise than by a general assertion, that he was unprovided with testimony, without setting forth who were the witnesses, the benefit of whose testimony he wanted, or what they

could have proved. It does not appear that there was any evidence before the Court of Chancery which was not given to the jury, and they having decided upon the right, the verdict ought not to have been set aside.

But admit the court should be satisfied that the appellant was only entitled to a fourth of the ticket, then I insist secondly, that the Chancellor ought not to have set aside the verdict, but should have enjoined one half of it.

In cases where a verdict is vicious in all its parts, or where no standard is furnished by which to modify it, I admit it ought to be set aside in the whole. As in cases where it is unfairly obtained, or where the action is merely founded in damages, as in trespass and the like. But in this case, if Philip M'Rae was entitled to only one fourth, instead of one half of the ticket, then he is as certainly entitled to one half of the amount of the verdict, as in the other instance he would have been to the whole.

As to the part of the ticket for which the jury gave him damages, there is no sort of uncertainty. The whole testimony in the cause proves, that the appellant claimed only one moiety of the ticket. One of the jurymen proves that the damages given, were for that part. A single jurymen deposes, that he intended the damages for the whole ticket. Consider what a dangerous precedent it would establish, if in any instance, a single jurymen, or even two, should be permitted after a fair trial to set aside the verdict, by saying, that he intended to find in this, or in that way. Such a decision would be in direct opposition to that laid down in the case of *Cochran vs Street* (ante vol. 1, p. 79,) where the court went entirely upon the evidence of a *large majority of the jurors*, which proved that they decided upon a mistake.

In opposition to this solitary jurymen, is not only the evidence of another jurymen, as well as that of many other witnesses, but the amount of the damages assessed, plainly proves, that the verdict was for a moiety only of the value of the property, *with interest* from the time it was withheld from the appellant.

The right of the appellant to interest, cannot I presume be contested. If the appellee had not wrongfully conveyed the property to Roderick M'Rae, and the appellant had resorted to a Court of Chancery to compel a conveyance of the part belonging to him, the mesne profits would have been decreed, and it would have been error to have refused. Having sued for damages,

mages, he was upon the same principle entitled to interest in lieu of the profits. And if the jury ought to have given interest, the court will presume they did do so, and not that they gave damages for the whole value of the ticket, which the appellant did not claim.

Why then shall the verdict be set aside, and the appellant put to sea again to establish his title, which has once been fairly ascertained? If he be entitled only to a fourth, his right to a fourth ought not again to be put in jeopardy, since the jury, having given damages for a half, have furnished this court with a rule to go by, in ascertaining the excess which ought in equity to be enjoined.

But if it were necessary for the court to direct an issue at all, it ought to have been one to ascertain the *value of the fourth part*, and not one, which was to bring the appellants right to *any thing*, again into question.

CAMPBELL for the appellee. A short attention to the history of this transaction, will furnish a sufficient answer to the first point.

In the suit instituted at law by Philip M'Rae against Woods, he claimed the whole of the ticket, and recovered a judgment for the whole, in damages. Woods applied to the Court of Chancery, setting forth, that tho' Philip M'Rae was in possession of the ticket, yet he obtained it tortiously, and had no title whatever to it. Philip M'Rae, in his answer, admits himself entitled only to one half of the ticket, and upon these proceedings it necessarily and properly became a question with the Chancellor, whether Philip M'Rae was entitled to any, and to what part of the ticket?

There appears to be two subjects of enquiry now before the court, 1st, Can the verdict already found be established? And if not, then 2dly, How ought the court to proceed after setting it aside?

1st, That the verdict cannot stand as it is, is what I confidently insist upon. If it were intended to give the appellant damages for half the ticket, it is unwarranted by the testimony in the cause, which goes completely to prove, that if he were entitled to any thing, it could only be to a fourth.

If damages for the whole ticket were intended, then the appellant's counsel does not attempt to maintain it. Yet one of the jurymen has deposed, that he intended the damages for the whole of the property. This testimony is objected to by Mr. Marshall, who seems to consider a jurymen in such a case, as an incompetent witness. Let me ask, if a bye stander had proved misbehavior
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would the court who tried the cause, or a court of equity have hesitated to set aside the verdict? It is admitted, that if many jurymen had concurred in proving the same fact, that their evidence would have deserved weight. But let me ask, can the influence of truth depend upon numbers? Or can testimony coming from a jurymen be less worthy of credit, than if given by a stranger? If he had been himself mistaken, or if he knew of a mistake in any of his brethren, it was his duty to expose it, that the error might be corrected.

2d, If then the verdict is to be set aside, what is the court to do? It is entire, and cannot be set aside in part and confirmed in part. It is either for the whole, or for a half of the ticket. Both are wrong. But whether it be for the one, or the other, this court can at most only conjecture. One jurymen says the first, the other the last. Where then is the standard which Mr. Marshall speaks of, by which the court can divide the verdict?

The court must decree either upon the evidence, or upon the verdict. Not upon the last, because that is avowedly wrong. If that be given up, and the court suppose they can with propriety look into the evidence and decide upon that, I am ready to go into it. There is a case in Morgan's Essays, of an action upon a bill of exchange. There were two counts in the declaration, upon one of which, the jury found for the plaintiff; upon the other, there was an improper finding for the defendant. The plaintiff desired to set aside the second finding, and to retain the first. But the court refused, as the verdict was entire. It is argued that the jury are to be presumed to have given interest, because they ought to have done so. But I do not think they ought. Philip M'Rae complains that Woods conveyed to Roderick M'Rae instead of himself. But this arose from the neglect of Philip M'Rae, who had improperly acquired the possession of the ticket, and without which no verdict could have been obtained. But Woods did right in conveying to Roderick M'Rae to whom he had sold the ticket. What considerations then prevailed with the jury in forming the verdict cannot certainly be known by the court.

As to the value fixed upon the property in the scheme of the lottery, it furnishes no standard by which the intention of the jury can be explained.

MARSHALL in reply. That a verdict is entire at law cannot be denied. But that a court of equity may, when there is a guide to go by, set it aside in part only, is every day's practice.

tice. If the verdict be improper in the whole, as if the trial be unfair, or the whole finding be inequitable, or if it be wrong in part, but the court has no standard by which to distinguish the good from the bad, in such cases the whole verdict ought to be set aside. But if, as in the case of a bond, the plaintiff has recovered too much at law, what does a court of equity do? Not set aside the whole verdict, but injoin so much of it as the obligee in conscience is not entitled to. If it be necessary to direct an issue, the court does so as to the part disputed, but never sets aside the verdict which in the first instance is presumed to be right.

There is a great difference between evidence to prove misbehavior in the jury, and the evidence of a jurymen given long after the trial, as to his secret intentions at the time of giving his verdict. The former might be seen or heard, and with respect to which, compleat evidence might be adduced. The latter is concealed from all the world but the juror himself. No other person can know what were the secret workings of his mind. If the jurymen in question went upon a mistake, it does not appear that he disclosed it to any person at that time. To permit him now, when impressions have been made upon his mind by one of the parties, to set aside the verdict, would be to establish a most dangerous principle, and such as must prove fatal to the purity of the jury trial.

I still insist, that the jury were right in giving interest, since it was the duty of the appellee to make the deed to the person *who had possession of the ticket*; he acted improperly in conveying to Roderick, and by taking upon himself to decide the rights of the parties, he is liable to the appellant for the mesne profits, or for interest in lieu of them.

FLEMING, J.—In this case there is a great contrariety of evidence. The arbitrators gave Roderick M'Rae half of the ticket, and Philip M'Rae avers, that he claimed no more. But the declaration demands the whole, and it is probable that the verdict was for the whole, since the amount of the damages very little exceeds the price affixed to the property by the scheme of the lottery. To explain the principles by which the jury were governed, two of that body have been examined, and they differ from each other upon the main point. Objections were made to the examinations of the jurors; but it is not only usual, but I think proper to admit such evidence for the purpose of discovering errors which the jury may have committed. In this case, I should not feel an inclination to be over scrupulous in admitting

admitting testimony, when I reflect, that the appellant acquiesced for fifteen years without asserting his right to the property in question, until better evidence might be lost. I am well satisfied that Philip M'Rae, is entitled only to one fourth of the ticket, independantly of the award and evidence of the juror. He has recovered one half if not the whole, and as I can discover no standard by which to decree him what he is really intitled to, there seems to be no way left, but the one adopted by the Chancellor to do essential justice to the parties. I am therefore of opinion that the decree is right.

LYONS, J.—I think this case has come up too early. The Chancellor does not set aside the former verdict, but only directs an issue to be tried to satisfy his conscience. The question tried and decided by the jury was the right of the appellant to the ticket. The possession was considered, and certainly was at law *prima facie* evidence of title. But the question is, did the jury give a verdict for the whole of the ticket, or for a part, and for what part? How was the Chancellor to ascertain this with certainty? It is admitted, that the appellant was not entitled to the whole. No way remained, but to direct an issue to try the question for the information of his conscience.

But before the issue is tried, and before it is known what would be the decree of the Chancellor, the party appeals. Ought the Chancellor to be restrained from directing issues to inform him whether a fact be one way or the other? Surely not, and therefore the appeal in this case is certainly premature. The inquiry is merely as to the extent of Philip M'Rae's right. It is nothing to the court of equity how Philip M'Rae came by the ticket; but it is essential to know to what part he is entitled, and the value of it. At present it is impossible for the court to ascertain that point. I therefore think the decree right.

THE PRESIDENT.—As I am of opinion that the appellant had no ground to come here at all, I shall not inquire whether he has done it too early, or not. Amidst the clashing testimony in the cause, it is evident to me, that Philip M'Rae had not a right to more than a fourth. As soon as the lottery was drawn, the two M'Rae's began to dispute respecting this ticket. My own impressions are, that Philip M'Rae has no right at all; but I would not for this reason award a new trial, since the verdict which has been fairly found, is in his favor: But the extent of his right is not ascertained.

If then Philip M'Rae was entitled to no more than a fourth, the verdict which gives him much more ought to be corrected. We

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were anxious to do this if we could without disturbing the verdict. But we could discover no certain standard by which the court could make the correction. We looked for it in vain in the value affixed to the property in the scheme of the lottery. We then looked for it in the sales, with no better success. The next chance was the verdict; but that appears to be for the whole, because the declaration claims the whole. We next referred to the testimony the jurors; but they differ upon the subject. The appellant attempted to account for the sum found by the verdict by supposing, that the jury had allowed interest upon the claim, because they ought to have done so, but this is equally unsatisfactory. It is entirely discretionary with a jury, whether they will give interest or not. And whether they meant to give it or not, is perfectly uncertain. My own opinion is, that in this case, interest ought not to have been allowed. Woods gave notice to Philip M'Rea that he would not convey to him, but having together with Mullins sold their interest to Roderick M'Rea, he made a conveyance to him. In 1771, the land is sold as the property of Roderick; it is advertised in the neighbourhood of Philip, and the property is passed from hand to hand; In 1769, Philip having received notice from Woods, seems to have abandoned all intention of recourse against him and applies to Roderick. They agree to a reference, and in 1784, Philip M'Rea for the first time shews an intention to resort to Woods, having no prospect of recovering any thing against Roderick. Woods in consequence of this unreasonable delay has now no chance to recover against Roderick, and therefore ought not to pay interest.

Another mode was thought of by the court, and that was, to direct the jury to value a fourth of the ticket; but against this a considerable difficulty occurred on the subject of interest, in which we thought we had no right to controul the jury.

Upon the whole, I concur with the other judges in approving the decree.

Decree affirmed.

NEWELL

NEWELL

against

THE COMMONWEALTH.

A RULE was made by the District Court of *Washington*, that the appellant should be summoned to the next court to shew cause, why an information should not be filed against him for bribery and corruption in his office of justice of the peace, for the county of *Wythe*, in voting for a clerk of the said county. The defendant appeared in his proper person, and failing to shew sufficient cause to discharge the rule, the information was ordered to be filed. The caption of the information is thus "District of *Wythe, Washington and Russel*." It states, "that the office of clerk of the peace in each county, is an office of great trust and confidence touching the administration of justice, &c. and that the said office in case of vacancies, is in the disposal of the justices of the peace for the same county. That by an act of Assembly entitled an act &c. the county of *Wythe* was formed, and it was among other things enacted that the justices of peace to be commissioned for the said county, should meet at the house of *James M'Gavock* in the said county, upon the first court day after the same should take place, and having taken the oaths prescribed by law, should proceed to appoint and qualify a clerk, provided that such appointment should not be made, unless a majority of the justices were present.

"That upon the first court day after the said county had taken place, viz. on the 25th of May 1790, at the house of *James M'Gavock* in the said county, a majority of the justices were present, and the said *James Newell* was then a justice of the peace for the said county, and was then and there present, and did then and there take the oaths of a justice of peace prescribed by law, and a certain *W. Crocket* and a certain *Robert Crocket* were then and there candidates for the office of clerk of the peace in the said county. That the said *Newell* not regarding the oaths of a justice of peace so by him taken &c. upon the day and year aforesaid, at the house of *James M'Gavock* in the county aforesaid, did unlawfully, wickedly and corruptly accept, receive, and take from the said *W. Crocket* a corrupt promise that if he the said *James Newell*, would then and there give his vote in favor

" of

“ of him the said *W. Crocket* to be clerk of the peace in the
 “ said county, and if he the said *W. Crocket* were elected, then,
 “ he the said *James Newell* should as a reward for his vote,
 “ have from him the said *W. Crocket* one half of the profits
 “ that might accrue to him by virtue of the said office; and that
 “ he the said *James Newell* did then and there, acting in the ca-
 “ pacity of a justice of peace, unlawfully, corruptly, and wick-
 “ edly give his vote in favor of the said *W. Crocket* to be clerk
 “ of the peace in the said county, in consideration of the said
 “ corrupt promise, so as aforesaid made by the said *W. Crocket*,
 “ and accepted by the said *James Newell*, to the great dishonor
 “ of the office of justice of the peace, against the form of the
 “ statute in such case made and provided, in open violation of
 “ the laws, and against the peace,” &c.

On the plea of *not guilty* the jury found the defendant guilty, and amerced him in the sum of £50. The defendant moved in arrest of judgment, and assigned as cause thereof, that the information concludes, that the offence was contrary to the *form of the statute* in that case made and provided, and in open violation of the laws, and the information cannot be maintained on either the statute, or common law of *England*, as the assembly of *Virginia* on the 19th day of December 1788, passed an act, “ entitled an act, to punish bribery and extortion” and that in the act last mentioned, only a *qui tam* information could be maintained. The errors being over-ruled, judgment was entered for the £50, for the use of the commonwealth, and the costs, from which judgment, the defendant appealed.

CAMPBELL for the appellant. The first exception which I shall take to the proceedings is, that it does not appear the appellant *was summoned* to shew cause against filing the information, in the manner required by the act of Assembly.

This mode of proceeding, by which the party accused is deprived of a trial by the grand inquest of his country, ought to be so guarded, as to diminish as much as possible the injury which he may experience, from losing the chance of an acquittal by that tribunal. In criminal cases, it is not only necessary that the court should do right, but it should appear in the record of their proceedings that they have done so. Nothing is to be intended. It is not enough then, that the court *directed* the party to be summoned, but it should appear that he was *actually summoned*. It is true, the appellant is stated to have appeared, and failed to shew cause against filing the information; but he might have been accidentally in court, and to this

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circumstance,

circumstance, may fairly be attributed his inability to shew cause against the prosecution. It has never been decided that an appearance in criminal cases, could cure any error whatever.

2d, This is a prosecution for bribery and corruption in the election of a clerk. I contend that the information ought to have stated, that *an election was holden*. If a man be arraigned for misconduct in his *official* capacity, it ought to be charged, that he *officially* acted. Only one magistrate is stated to have qualified, and it does not even appear that a court was convened.

3d, The offence is not laid to have been committed "*within the jurisdiction of the court*." I admit, that if there be *tantamount* words, they will supply the want of those above mentioned. The *caption* of the information does not more necessarily mean the names of *three counties*, than it does the names of three persons. But if it do, there is no way by which to infer that the offence was committed within the jurisdiction of the court, but by connecting *the caption* with the sentence which charges the offence to have been committed at the house of *James M^r Gavock* in the county aforesaid, which is nonsense. We cannot hunt over the intermediate parts of the information, so as to connect the above clause with the *caption*. There is no precedent where the want of laying a jurisdiction has been considered as fatal, in which an industrious court might not from the whole information have collected enough to remove the objection.

Lastly, I contend that upon the merits of the case, the judgment is erroneous.

The offence charged, is either *bribery*, or *the sale of an office*. It cannot be the first, because that can be committed only by a person in a *judicial capacity*. 3. *Inst.* 145. 147. *Extortion* may be committed by him who acts ministerially, but *bribery* cannot.

The election of a clerk, though committed by the law to the *judges*, is a *ministerial*, and not a *judicial* act. The legislature might authorise the judges to do an act of a ministerial nature; but it would not therefore change its nature, and become a *judicial* act.

The information then must be supported, as an offence in the *sale of an office*.

The act of Assembly against the sales of offices, was passed in October 1792, and this prosecution was instituted in May 1791, so that the appellant cannot be convicted under that act. The statute of *Edw. 6.* then must be resorted to; and if so, it is liable to the following objections:

1st,

1st, The appellant is ordered to be cited to shew cause why an information should not be filed against him for *bribery and corruption*; instead of which, he is charged with an offence of a different sort. If it be necessary that the party accused should be cited at all, I contend that it is the more necessary, the citation should *truly state* the nature of the accusation; for otherwise, it would rather serve to entrap than to benefit him. The information cannot be filed without the leave of the court: but the leave granted in this case, authorised an information for one offence, and an information for a different offence is filed; it was therefore filed without leave.

2dly, It is determined in Salk. 411, that the stat. Edw. 6. does not extend to the colonies.

MARSHALL for the appellee. The first objection is, that the appellant does not appear to have been summoned. But to this, the record seems to have furnished a compleat answer. He is stated to have *appeared*, which must mean a *legal appearance*, which it could not be unless he were summoned.

The second objection is, that it does not appear that an election took place. It is stated that the appellant received the bribe, and *voted* for the clerk, which makes the offence compleat, tho' the election from any cause whatever did not take place. The information states that he accepted a corrupt promise, &c. and *acting as a justice of the peace* did give his vote. He must then have been in court acting in his *official* capacity.

The third objection is, that no jurisdiction is laid. It is contended that the names of the counties mentioned in the caption, may as well mean *men*, as *counties*. But *three men* cannot make a *district*; this would be absurd. The information charges, that by law, the justices were to meet at the *house* of *James McGavock* in the county of *Wythe*; that they did meet at that *house in the said county of Wythe*, and that *then and there* the appellant committed the offence. It follows, that the house was in the county of *Wythe*, and *Wythe* is said to be *one of the counties* composing the *district*. The offence then must necessarily have been committed *within the jurisdiction of the court*. Besides, if this be error, it is cured by the act of *Jeofails*. In England it is determined, that the statutes of *Jeofails* do not extend to *criminal* cases, because the first statute being confined to *civil cases*, the judges construed all those which followed, in the same manner. It is otherwise with respect to our act of *Jeofails*, which is not confined to civil cases by any expressions which the legislature have used,

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Upon the last objection I would observe, that whatever may have been the English decisions concerning the operation of the statute of Edw. VI. in the colonies, the convention in this state, by an ordinance passed in the year 1776, adopted all the English statutes prior to the 4th James I. not of a local nature. This is certainly not local, since it applies to offices which are as well known here as in *England*; and if the act of selling them be criminal there, it is equally criminal here.

CAMPBELL in reply. I have contended that it should appear that the appellant was cited. 2 *Haw. P. C.* 263, may be mentioned against me. To this I answer, that the recognizance there spoken of, was not essential to the defence of the accused; a notice of the intended prosecution was.—The same answer may be given to what is said in the same book page 270; the oath was required for greater solemnity, but was not necessary to the defence of the accused.

2d point. 2 *Haw. P. C.* 225, shews the certainty necessary in an information. The information states that a majority of the justices were present, but not that they held a court, and unless they did so, the justices might have been present on other business, and not in their official capacities.

3d point. The caption is no part of the indictment, 2 *Haw. P. C.* 165 to 169. It cannot therefore be referred to, to shew the place at which the offence was committed, tho' it may be, for the purpose of shewing, that the court was holden within the extent of the commission.

4th point. If the stat. of *Edw. VI.* were adopted by the ordinance of Convention, yet that ordinance was repealed by the act passed in December 1782, which declares, that no English statute or act of parliament shall have any force in this commonwealth.

ROANE, J.—Several objections were made at the bar to the information and proceedings in this case. As there is one which I deem substantial, it will be unnecessary to take notice of the others. It is not alleged in the information that an election was holden, or that at that election, the vote was given. The prosecution, as appears by the order for a summons, and from the whole tenor of the proceedings, was for *bribery* in the election of a clerk. But is the offence properly set forth? Though I am well satisfied that an election took place, and that upon such election a corrupt vote was given, yet as implications can never without danger be admitted in criminal prosecutions, whether they be by information or indictment, I cannot

cannot judicially know the fact unless it be certainly alleged.

It is not certainly stated that the other judges were sworn, that an election was holden, or that the vote was given at that election. If the information had been sufficiently particular in these respects, the validity of the election would have been immaterial. But the vote, from all that appears in this information, might have been a solitary one by *Newell*, and not social with his companions; and I hold it to be exceedingly clear, that wherever an election depends upon the votes of a particular body composed of many individuals, it should as plainly appear that an election was holden by that body, as that the individual accused voted at it, for the statute against the sale of offices will not in such a case apply to an individual exercise of the power of appointing. If the appellant gave a solitary vote, it was not an offence within the meaning, because it could not be within the mischief of the statute, for such a vote could not confer even a colorable title to the office. Neither do I conceive that the case would in this respect be different at common law, supposing that a promise of a reward would constitute the offence at common law. I am therefore of opinion that the offence is not sufficiently set out in this information, to authorise a judgment either under the statute, or at the common law. The judgment I think, ought to be reversed.

CARRINGTON J.—I am clear that the information wants that precision necessary in all criminal prosecutions. We can presume nothing, and since it was essential that an election should have been holden, and the vote then given, it ought to have been clearly alleged, and cannot be intended. I agree with my brother *Roane*, that the information is insufficient, and ought to be quashed.

LYONS J.—I concur in opinion with the other judges, that the information has not certainty enough in describing the offence. It ought to appear that the offence existed otherwise than in intention: and that it was actually carried into execution, which could only be, by an election having been holden, and the corrupt vote then given.

THE PRESIDENT.—We all agree that there is not sufficient certainty in the information in describing the offence. It is not sufficiently alleged that a majority of justices qualified; that a court was holden, that an election took place, and that the vote was then given.

Judgment reversed with costs, and the information quashed.

WHITE

WHITE *against* ATKINSON.

THIS was an appeal from a decree of the High Court of Chancery in a suit instituted there, by *White* against *Atkinson*, for the conveyance of a tract of land, sold by *Coleman*, the agent of *Atkinson*, to the appellant.

In November 1779, *Coleman*, the agent of the appellee, contracted with the appellant to sell him a certain tract of land belonging to the appellee, according to certain metes and bounds, for the price of £ 6 per acre, the quantity to be afterwards ascertained by a survey. Two thirds of the purchase money was to be paid in the months of May, or June following, when a title was to be made, and a bond was to be given by the appellant for the balance of the purchase money, payable in twelve months thereafter, and to carry interest from the date. The survey was accordingly made in March 1780, and the quantity ascertained, at which time a memorandum in writing was signed by *Coleman* and delivered to the appellant, expressive of the contract before mentioned, except as to the time of payment of the two thirds of the purchase money which is stated in the memorandum to be when the deed should be *acknowledged* by the appellee.

The bill charges, that a tender of the money was made to *Atkinson* in specie, according to the scale of depreciation, but there is no proof of it, nor that even a demand of a deed was made and an offer to pay, until long after paper money had ceased to circulate.

The defendant *Coleman* admits in his answer, that a deed was neither made, nor tendered by *Atkinson*, but that he agreed late in the year 1781, that *White* should have a conveyance, if he would then pay the money. No deed was ever executed, nor was any part of the purchase money paid, except £ 18 paid by *White* to *M^cCraw*, a creditor of *Atkinson's*, and for which he had credit with the said *M^cCraw*. It also appears, that long after the contract was made, *White* was willing to make payment, if he could have obtained a conveyance, but the parties differing about the value of the money, nothing was done.

Upon a hearing of this cause, the High Court of Chancery decreed, that the defendant should convey the land in question to the plaintiff, upon his tendering, or paying to the defendant so much money, as with £ 18, was equal to the *value of the land, on the last day of June 1780*, to be established by a jury on an issue to be tried for that purpose.

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The verdict upon this issue being certified, it was decreed that the plaintiff should over and above the sum found by the jury; pay to the defendant the interest thereof, to be computed from the last day of June 1780, and the costs expended by *Atkinson*, as well on the trial of the issue, as in the said Court of Chancery, upon *Atkinson's* executing a sufficient conveyance of the land in question to *White* and to his heirs, and delivering the same, or (if refused by him) depositing it with the clerk of the court.

From this decree *White* appealed.

CAMPBELL for the appellant. I admit that he who applies to a Court of Chancery for equity is bound to do equity. But the question is, what is that equity which the contract in question required the appellant to do? The court cannot possess an arbitrary power of deciding what the party shall do who applies for equity, but must be governed by general rules and principles which bind that court. What then was the contract sought to be specifically executed? That *Atkinson* should convey the tract of land to *White*, and should receive payment at the rate of £ 6 per acre, two thirds at the time the conveyance should be made, and the residue in twelve months thereafter, for which a bond was given. This is proved by the written paper delivered by *Coleman* to *White*.

The argument of hardship drawn from a depreciation of the paper money, is repelled, by considering that it was in the power of *Atkinson* at any time to coerce the payment of two thirds of the money by tendering a conveyance.

But I ask, could the depreciation of the money furnish a sufficient reason for the decree given in this cause? Suppose the money had appreciated, and *Atkinson*, who had it in his power to enforce payment of the money, had sued at law for the purchase money, or had applied to a court of equity for a specific performance; could either court have protected him from the payment of the money at its increased value? surely not. Ought not the same principle then to exist where the purchaser seeks a specific performance? The tobacco contracts made during the war have uniformly been enforced, and they were not less oppressive upon the debtors. The court is called upon to carry a contract into effect; instead of which, a new one is made for the parties, and the purchaser is decreed to pay according to the value of the land, instead of the value of the money at the time of the contract.

It appears that *White* had the money ready to pay for the land, though he did not legally tender it, nor demand a conveyance. But I contend it was not necessary for him to do either.

It is

It was the duty of *Atkinson* first to acknowledge the deed, or to inform *White* that he was ready to do so. But he did neither; and to permit him now to demand the money at the value stated in the decree, is to suffer him to avail himself of his own wrong. Besides; if the legislature of a country shall declare iron, leather, or any other thing to be money, and shall give to it a certain value, I cannot understand how any court can establish a different standard of value.

MARSHALL for the appellee. This is a case where precedents cannot be expected. Men differed as much in their opinions respecting the value of paper money, as upon any subject whatever. The legislative declaration respecting depreciation, could not regulate the various opinions of men as to the value which they annexed to the money at the time they were forming their contracts.

Suppose in this case, the appellant had brought his suit at law for damages; the jury would not have been bound by the arbitrary value put upon the money by the legislature, but would have given such damages as they thought the party in justice entitled to. But if he prefer an application to this court for a peculiar relief, which no other tribunal could afford him, he must submit to the rule of this court, which requires him to do equity, in return for the equity he seeks. Upon this principle it is, that a mortgagor coming here to redeem his estate which is forfeited at law, must do equity by paying other debts due to the mortgagee, tho' not secured by the mortgage. The court lay him under these terms, not because the parties have agreed to it, but because it is equity. Might not all the arguments used by Mr. *Campbell* in this case, apply with equal weight to the one just mentioned?

I do not agree that the contract is as stated by Mr. *Campbell*. The bill describes the agreement agreeably to the memorandum given to *White* by *Coleman*. This is denied in the answer, and *Coleman* states, that the money was to be paid in the June following and then the conveyance was to be made. The appellant then has been the cause that the agreement has not been executed, and yet seeks to gain an advantage by his own wrong.

CAMPBELL in reply. In cases where the specific execution of an agreement is asked for, the court may refuse to interfere if the contract be inconsistent with the principles of equal justice & good conscience, but if it do interfere, the terms of the contract must be pursued. But this decree cannot upon any principle be right. The most which the court could have required of the appellant, was to convey according to the value of the paper money at the time it ought to have been paid, and not

the *value of the land*; this would be to take from the appellant a good bargain which he may have made, and which, having made fairly, he was entitled to enjoy. The case of an application by the mortgagor to redeem, is not apposite. There, the court goes upon an implied agreement of the mortgagor, that the subsequent loan should be secured by the mortgaged property; for as to debts contracted prior to the mortgage, the principle does not apply.

ROANE, J.—This is a bill praying for the *spec fic execution* of an agreement, whereby, the agent of the appellee contracted to sell to the appellant a tract of land, for the consideration in the bill mentioned. The appellant alleges this contract to have been made on the 18th of March 1780, but as the memorandum then given, and on which he seems to rely, is consistent with the declaration of *Coleman* the agent, in his answer, that the contract was really made in the November, or December preceeding; and as *Barkesdale* a witness in the cause, states his belief, that this land was sold prior to the year 1780, I shall consider this contract as really made in one of the said months of November or December; and as *Coleman* the agent of the appellee admits, it might have been in the month of December, (which admission is to be taken most strongly against the party who makes it) I shall fix upon the month of December 1779 as the time of the contract. This contract was a general one, by which the agent of the appellee, agreed to sell the land in question to the appellant for £6 current money per acre; whereof two thirds was to be paid in the months of May or June following, when a deed was also to be executed, and for the balance the appellant was to have a longer credit. The appellant did not punctually pay the money according to his undertaking, and although he afterwards shewed a willingness to do so, it was refused by the appellee, because of its depreciation. The appellee also refused to give a conveyance of the land, unless the appellant would make such a settlement and payment, as would be satisfactory to his agent, *Coleman*. Thus matters rested untill after the abolition of paper money, when *White* exhibited his bill.

This case is not as I conceive distinguishable from the common one of a bill for the execution of an agreement, after a failure of payment on the part of the purchaser, except so far as a distinction may arise from the situation of this country at the time of the transaction, in respect to its circulating medium.

I will therefore consider this case 1st, as independent of that circumstance: and 2dly, as affected by it.

It will not, I presume, be denied, but that in the case of a general agreement, made in times when the currency is permanent, and unattended with any peculiar circumstances, a court of equity would decree a conveyance upon payment of the principal money contracted for, and legal interest. It would make such principal money the measure of that which the purchaser is to pay, on one of two grounds; 1st, as being a fulfillment of the very agreement made on the part of the vendee, and consented to by the vendor. Or 2dly, if it should be proper on the ground of there having been a forfeiture, to consider what is a just compensation, it could fix upon no criterion whereby to estimate this compensation so proper as the contract of the parties themselves.

There is no doubt, but that if the real value of the property sold is to be regarded, ought to be ascertained *as at the time of the contract*; and the opinion of both parties as to such value at that time, ought to be conclusive upon both.

That is however the case of a contract in currency of a fixed value, and for the non-payment at the time it became due, the law has settled the equivalent, namely, *5 per centum per annum*. But the case now under consideration is that of a contract made in a depreciated and depreciating currency. We will therefore consider how it is affected by that circumstance. I very readily admit, that where a party against whom a bill is brought for the specific execution of an agreement, shews that such would be unconscionable, and prays that it may not be decreed but upon such terms as are just, a court of equity may impose such terms upon the plaintiff, and if he will not submit to them, may dismiss his bill. But to decide what are, and what are not such equitable terms as the court ought to impose, will depend upon the circumstances of every case, and upon the exercise of a *sound discretion* by the court. I say of a *sound discretion*, because it ought not to be an arbitrary one, and in particular, it should respect the laws of the country, and so far as may be, the agreement of the parties themselves. The act of 1781,—establishing a scale of depreciation, and declaring that out standing current money contracts should be regulated by such scale *as at the date* of such contracts,—appears to me, in effect, to have converted such current money contracts into specie contracts; for it declares that such shall now be discharged by as much specie, as shall appear, by the application of the scale, to have been
then

then (viz. at the date of such contracts) the value of the current money. In the case of specie contracts generally (as is above supposed,) upon payment of the sum contracted for, and interest, a specific execution would be decreed. But the case is not different in substance where the contract was for paper money: the value of that paper money, and not the numerical sum, is what the vendee is bound to pay, and the vendor entitled to receive. If the scale forms a just rule for ascertaining the value of paper money in specie, by the application of it to the current money contract of the parties, we can find the value in specie of that which was contracted to be paid, not less truly, than if the contract had been for specie itself. And the seller can no more complain of receiving such a sum with interest, as being less than he contracted to receive, than he could complain of receiving principal and interest in case of a specie contract. The legislature have established this scale as a just rule, whereby to settle paper money contracts in specie. It was no doubt made after due deliberation, and upon good information. It has been generally acquiesced in by the people of this Commonwealth, and has prevented much litigation. It affords, I suppose the best rule for ascertaining the value of the paper money, having been made by those, who represented every part of the state, and had the best opportunity of judging. The opinion of the Court of Appeals in the case of *Hill vs Southerland's executors* (ante vol. 1, p. 128) does not preclude me from considering this scale as affording a just rule for estimating the value of paper money, as it respects the years posterior to 1778. Perhaps, that case impliedly admits the scale to afford a just rule, *except as to the years 1777, & 1778*. At any rate, I have no data whereby I am justified in saying that as to the contract in question, the scale does not afford a just rule? But the appellee alleges, that he had immediate use for the money, and that he sustained an injury by the want of punctuality in the payment. If he had shewn to the court the amount and particulars of the injury, and moreover, that he had apprized the appellant that his situation was so peculiar as to render punctuality in the payment important to him, I will not say, but a court of equity would lay hold of those circumstances to vary the decision, which I think ought now to be given. But it seems to me, that without such data, we ought not to go into the consideration, how far the seller may have sustained a loss by the non-payment of the money when due. Neither ought the purchaser to be affected by a loss resulting to the seller on account of any peculiarity in his situation, when such situation was not made known to him.

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In fact, the pretension which I am now considering, would as well apply to a specie, as to a paper money contract; with this additional circumstance attending the latter, that the money if paid, might have been refused by the appellee's creditor, and in that event, or if he were not himself a debtor, it might and probably would have died in his hands by the abolition of that currency. I might here add, that such was the peculiar situation of this country during the existence of paper money, that many, if not most creditors were ruined by a punctual performance of contracts made on credit; whereas it was by the virtuous and honourable conduct of some debtors in withholding payments, that many creditors were sheltered from destruction.

The 5th section of the act of 1781, establishing a scale of depreciation, gives to the court a power to depart from such scale, where circumstances shall arise, which in their opinion would render a determination according to it unjust. Such a power I have already admitted is exercisable by a court of equity, upon an application like the present, independent of this section, where the circumstances will justify it. What those circumstances are, which are contemplated in this section, I will not undertake to say; but it would seem to me that they must be such as are peculiar to that very case, and not such as are common to every case. The one now under consideration appears to exhibit no circumstances which may not reasonably be supposed to attend every paper money contract, which was not punctually complied with. But it is said, that the court ought in this case to depart from the scale, because otherwise, the appellee will not get the value of his land. The counsel for the appellee candidly acknowledged that he did not place his hopes of setting aside the contract in the present case, upon the equality of the sum produced by the scale, compared with the real value of the land. Indeed a contrary doctrine would involve the court in a difficulty, where to draw the line, if every (even the minutest) inequality, should not be deemed sufficient to justify a departure from the scale; but before we can say that a given sum is unequal to the value of the subject, that value itself must be ascertained.

In the present case, the value of the land at the time of the contract, is not ascertained, otherwise than by the original contract of the parties. There are two witnesses who say they think the land was worth fifty pounds of tobacco per acre; but what was the value of the tobacco in specie at that time, or whether those witnesses are credible, this court cannot undertake to say.

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A jury has also said the land was worth six shilling per acre. But the time to which their valuation has reference, was six months posterior to the time of the contract, within which period, the land might for any thing known to the court, have considerably risen in value.

Upon the whole, as by the application of the scale of depreciation, (which in this instance is presumed to afford a just, as well as a legal rule of liquidation,) to the current money contract of the parties, we can precisely ascertain the value in specie which was *contracted* to be given for the land, at the time the purchase was made, such application ought to have formed the criterion by which the Chancellor should have estimated the compensation to be paid by the appellant, and by this rule, the appellee will receive more in value than he would, if the money had been punctually paid, in consequence of its progressive and rapid depreciation.

I am of opinion therefore, that the decree should be reversed, and modelled as to the compensation, according to the ideas above stated.

FLEMING, J.—It is a rule at law, that the breach of one covenant, cannot be pleaded in bar to another. The appellant might have brought his action at law, and if he had, he must have proved performance on his part. Instead of resorting to a court of law, he has applied to a Court of Chancery for an equitable relief, and therefore, he must submit to the rules of the court which require him to do equity. This, is certainly very different from common cases. The agreement was made at a time when money was much depreciated, and was every day still farther depreciating. This condition of the circulating currency was known to both parties, and therefore punctuality was more necessary than it would have been, if the value of the money had been stationary. Since therefore, the appellant made the first breach in the contract, which operated to the injury of the other party, he is not entitled to the relief he asks for, but upon the terms of his doing equity; and this consists in his paying the real value of the land at the time of the contract. This was properly preferred by the Chancellor to a dismissal of the bill, since the appellant had paid part of the money, and very probably had made some improvements. I am for affirming the decree.

CARRINGTON J.—When this cause was first brought on, I was struck with the impropriety of interfering with the contracts of parties. But upon fuller consideration of the circumstances

stances of this case, I think that justice cannot otherwise be done. The real value of paper money was very little known to any person. There were few, who were not deceived by it. A want of punctuality never failed to produce a loss, and the longer payment was delayed, the more the loss was accumulated. The parties in this case certainly had depreciation in view, and *Atkinson*, may have calculated upon the use of the money, if punctually paid at the time agreed upon. Beyond that time no calculation could have been made. As to the payment of the money, it ought to have preceded the conveyance, and it is evident that *White* himself thought so from his conduct. Yet it does not appear that he tendered the money, or had it to pay. It is clear that *White* forfeited all his rights under the contract, at law, and then the question is, in what situation does he stand in a Court of Equity. The Chancellor instead of dismissing the plaintiff's bill, more properly decreed a conveyance upon the equitable terms of his making compensation; the standard of which compensation he very rightly considered to be the value of the land, as ascertained by a jury. I am of opinion that the period to which the valuation should have related ought to have been that, when the contract was made, and not that, when the first payment was to be made. The difference in this case is not important, but if either party requests an issue to try the value at the date of the agreement, I have no objection to indulging him. As to the danger of a precedent like this, I think that all such cases must depend upon their particular circumstances, and that the opinion now given will not apply but in a case precisely like the present.

LYONS, J.—The general rule in executory contracts respecting personal things is, that if the purchaser does not pay and take away the property in convenient time, the seller is not bound, and may dispose of it again. If earnest be given, the vendor must request payment of the consideration, after which he is absolved from the bargain if it be not paid. In cases of sales of real property, the rule of equity is; that though a forfeiture take place at law by a failure on either side, yet if it be a case lying in compensation, a Court of Chancery will relieve against it. But if that court do interfere, it must be in cases perfectly fair, equal and just. Another rule in a court of equity is, that he who would receive the benefit must sustain the loss. Here then occurs the difficulty of the case. The legislature have established a scale, by which to ascertain the sum in specie

specie which should be paid in discharge of contracts entered into at particular periods, whilst paper money was in circulation. This law was very properly passed, for otherwise the value in each particular case must have been ascertained by a jury, in the same manner as in actions for foreign money. This would have produced infinite trouble and litigation, which this law, (affording I believe the best *general rule*) is wisely calculated to prevent. It is of more consequence that the law should be fixed and known, than that it should always be strictly just. The debtor is to pay according to the scale at the *date of the contract*, because, as the payment was not punctually made, by which the debtor had the benefit of the money, and deprived the creditor of the use of it, the debtor ought to bear the loss by depreciation. This rule would have been enforced, if the creditor had brought his suit to coerce payment. This furnished an equitable course of reasoning with the Chancellor to depart from the scale, when he was applied to for equity. On the other hand if the creditor refuse the money when tendered, or if there be other circumstances to warrant a departure from the scale, it may be made; in no other case, can a smaller sum be allowed; in none more.

The scale is binding where the creditor sues. But where the debtor applies for equity, the rules which govern courts of equity may properly be applied to him. The case of *Wilson and Mr Rae vs Keeling*, (ante vol. 1, p. 194,) went upon the principle, that he who would have sustained the loss shall have the benefit. So here, if the money had been paid, a specie debt might have been discharged with it, or it might have been applied to other valuable uses. I agree, that *the time when the contract was made*, was the proper period for fixing the valuation of the land, and that in this respect the Chancellor was wrong.

The PRESIDENT.—To view this case as a general one, unaffected by the particular circumstances which attend it, the appellant has wholly failed in performing his part of the agreement. It does not appear that he was ready to do so during the whole year. If *White* had brought his action at law he could not have succeeded, without averring and proving performance on his part, or that he was ready to perform. The agreement therefore was entirely forfeited at law, and how does he stand in a Court of Equity? He has paid part of the purchase money, and has perhaps made improvements upon the land. This being a case where compensation can be made, a Court of Chancery will relieve, but upon what terms? If the contract

tract had been made in *specie*, the value fixed by the parties would have furnished the just measure of retribution. But even in cases of *specie* contracts, I will not say that this measure would in all cases be resorted to. Suppose a man sells at half price upon condition of punctual payment, calculating upon an ability which he might thence derive of making a beneficial investment of the money. Suppose it should appear that he had lost this advantage by want of punctuality. The court I think would properly depart from this rule, and might refuse to relieve but upon payment of the full value of the land. However this might be, it is certain, that in a case of a contract made in *paper money* where the scale furnishes no just rule for fixing the value of the money, the rule above mentioned ought to be departed from. No juror can say what were the ideas of the parties as to *the value of the money* at the time of the agreement.

The act of 1781, furnishes a good *general rule* for scaling paper money contracts; perhaps the best which could have been made. But it is certainly not just in all cases. What is the objection to the measure of compensation adopted by the Chancellor? Because the appellant had got an advantageous bargain, it is supposed hard to deprive him of it. But why is he deprived of it? Why did he not perform those acts which entitled him to retain the advantage? This court does not deprive him of it; he has been himself the cause of its being lost.

I agree with the other judges, that the period to be fixed for ascertaining the value of the land was that, at which the contract was entered into. The difference in *specie* is not considerable, but if either party wishes an enquiry (at his own expence) according to this opinion he may be gratified.

The opinion and decree as entered, is as follows, viz:

" That there is no error in the principle of the said decree,
 " so far as it subjects the appellant, to the payment of the *specie*
 " value of the land, as a condition upon which the land is to be
 " conveyed to him; and although the value at the time of the
 " contract should have been enquired of, instead of the value at
 " the day of payment, yet as the difference is probably trivial,
 " and not equal to the expence and trouble which would be incurred by a new trial of the issue for that purpose, the verdict of
 " the jury ought to stand as the valuation, unless either party
 " shall choose at his own expence to have such new enquiry made
 " in which case a new issue ought to be made up, and tried by
 " a jury, to ascertain what was the *specie* value of the land at
 " the time of the contract; and that there is error in the decree

" in

" in this, that the appellant is decreed at all events to pay the
 " money and take a conveyance of the land, instead of allowing
 " him the option of abandoning his claim, and losing the mo-
 " ney he has paid. Therefore it is decreed and ordered that
 " the said decree be reversed and annulled, and that the appel-
 " lant pay to the appellee *Roger Atkinson*, as the party sub-
 " stantially prevailing in this court, his costs by him about his
 " defence in this behalf expended. And this court proceeding
 " to make such decree as the said High Court of Chancery
 " should have pronounced, is of opinion, that the appellant hav-
 " ing failed to perform on his part the agreement sought to be
 " carried into execution, had forfeited all claim to the aid of
 " this court for that purpose, but having paid part of the pur-
 " chase money, and probably made improvements on the land,
 " he ought to be relieved against that forfeiture upon making
 " the appellee *Roger Atkinson* just compensation, the rule of
 " which ought to be the value of the land at the time of the
 " contract; and altho' that value usually is, and ought to be in
 " such cases considered as fixed by the contract when specie of
 " stable value is the medium of payment; yet in this case,
 " where that medium was to be in paper depreciated and ra-
 " pidly depreciating at the time, the contract affords no just rule
 " for ascertaining the specie value of the land, which was there-
 " fore properly enquired of and settled by the verdict of a jury,
 " and ought to stand as the rule of compensation; therefore, it
 " is further decreed and ordered, that upon the appellant's pay-
 " ing or tendering to the appellee *Roger Atkinson*, within three
 " months from the time of his being served with a copy of the
 " final decree in the High Court of Chancery the sum of one
 " hundred and twenty eight pounds, two shillings, with inter-
 " est thereon at the rate of five *per cent. per annum* from the
 " last day of June 1780, till payment, and the costs of this suit,
 " the said appellee shall execute a good and sufficient deed of
 " deeds for conveying to the appellant the land in the proceed-
 " ings mentioned in fee simple with a general warranty, but
 " if the appellant shall fail to make such payment or tender,
 " within the time aforesaid, that his bill in that case shall stand
 " dismissed with costs. But if either party shall upon this de-
 " cree being certified to the High Court of Chancery apply to
 " that court and desire a new enquiry to be made by a jury at
 " his expence, what was the specie value of the land on the last
 " day of December 1779, an issue shall be made up, and di-
 " rected to be tried by a jury to ascertain such value at that pe-
 " riod;

"riod; which being tried and certified to the satisfaction of the
 "said High Court of Chancery, shall stand as the rule of com-
 "pensation instead of the former valuation, and with the inter-
 "est thereon from the said last day of December 1779, after
 "deducting the eighteen pounds paid, be paid or tendered to
 "the appellee *Roger Atkinson*, within such reasonable time as
 "shall then be allowed by the said court to entitle him to the
 "conveyance in the above decree mentioned, or subject him
 "to the consequence therein stated in case of his default."

MARTIN, & WILLIAM PICKET,

against

JAMES DOWDALL.

THIS was an appeal from the High Court of Chancery, in a suit brought by the appellee against the appellants for the conveyance of two tracts of lands. The case was as follows: *James Crap*, in the year 1741, obtained a warrant from the office of *lord Fairfax* for surveying a certain parcel of land lying in the Northern Neck. The survey was made and returned in the same year, but no further steps were taken towards obtaining a grant by *Crap*, who died in 1773. His son, assigned all his right in the said land to the appellee, not considering it worth the expence of obtaining a grant. It appears by the deposition of one witness, that the plaintiff applied at the office for the papers, (but at what time is not stated,) and that they could not be then found; but they were afterwards found in the year 1786, or in 1787. A grant of the land to *Crap* was made out and registered in the *Proprietor's* office, but it was never executed by *lord Fairfax*. In December 1788, the appellee applied for and obtained a grant for these lands from the Commonwealth's land office.

In 1762, the father of the appellants obtained a warrant, from the *Proprietor's* office, and surveyed 243 acres, part of the land surveyed by *Crap*, for which a grant was made by *lord Fairfax* to his son, *Martin Picket*, one of the appellants, in the year 1780. In 1779, the other appellant *William Picket*, also procured a warrant, and surveyed 420 acres adjoining the above, which in-

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cludes the balance of the land claimed by the appellee, for which he obtained a grant from *lord Fairfax* in the year 1780.

The appellee charges in his bill, that the appellants and their father had notice of the title of *Crap*, before they surveyed the land in question, but this is denied by their answers, and no proof of it is made.

It appears that *lord Fairfax* established sundry rules in his office, respecting the terms on which lands might be acquired in the Northern Neck. Amongst others, the following was inserted in one of his entry books, which was begun in the year 1734, viz: "rules of the office. That the entries are not de-
" mandable after being made six months, or the warrants taken
" out to continue longer than six months in force, unless renew-
" ed or consented to by the *Proprietor* or agent." It is proved by sundry depositions, that at different periods from the year 1740, to the yearly 1764, notices were given by *lord Fairfax* in the public news-papers & else where, calling upon all persons entitled to entries and surveys, to come forward within a limited time, and pay the composition and office fees, and receive their grants, or that their rights would be considered as forfeited and revested in the *Proprietor*. There is also strong proof in the record of abandonment of the land in question both by old *Crap* and his son after his death, on account of the indifferent quality of the land, and the expence of obtaining a grant.

The HIGH COURT OF CHANCERY, being of opinion, "that the grant to the plaintiff of the land to which he is entitled ought to have relation to the time of the warrant, by authority of which the said land was surveyed, so as to be prior in effect, to the title of the defendants, both of whom had notice of that warrant and survey before the grants under which they claim" decreed, that the defendants should convey to the plaintiff at his costs, with warranty against themselves and all persons claiming under them, their right and title in and to the land lying within certain bounds therein described, comprehended within the limits of *Crap's* survey, and deliver possession to the plaintiff of so much of the said land as they hold, and account with, and pay to him the rents and profits thereof, from the 10th day of August 1789; from which decree, an appeal was prayed.

MARSHALL for the appellants. The rule of *lord Fairfax's* office was, that those who did not within six months perfect their titles to lands for which entries had been made, could not afterwards demand a grant unless the same was consented to

to by the *Proprietor*. They were considered as having abandoned their right, and the estate reverted in the *Proprietor*, who might grant the land to any other person. This rule is proved to have subsisted so early as the year 1734, of which the people in that District were constantly notified by advertisements inserted in the gazettes, and publicly posted up in the different counties. This rule being entered in the front of one of the entry books in the *Proprietor's* office, those who applied there to take up unappropriated lands, must be presumed to have had notice of it. The existence of the rule is further established by the depositions of many witnesses, and is further strengthened by a consideration of *lord Fairfax's* situation. Possessed of a very extensive territory, the value of which depended entirely upon its being parcelled out amongst those who as a retribution therefor were to pay him certain quit-rents, his revenue, as well as the means of supporting his office, depended upon the receipt of his fees, and of the stipulated rents, neither of which could be demanded, *until after a grant had been made*. It would have been highly unreasonable, that after a warrant had issued, the person owning it, should suffer it to lie dormant for many years, without going on to acquire the legal estate, and yet keeping off other applicants. I contend therefore, that *Crap*, by the rules of the office forfeited all right to the land, and that the *Proprietor*, might legally make any other appropriation of it. But independently of this point, I consider that the right of *Crap* was lost by abandonment, and rely for evidence of his intention to abandon, not only upon his declarations, as proved in the cause, but upon the unreasonable length of time which elapsed between the issuing of the warrant to him, and that to the appellants, during which period he seems to have shewn no disposition to obtain a grant.

I should insist if it were necessary that the appellants were purchasers without notice; for though it is proved that they had heard that *Crap* had taken up land, yet it does not appear that they knew it to be the land in dispute.

But I do not wish to rely upon this, because I contend first, that the right of *Crap* was completely lost by forfeiture, and secondly, if not so lost, yet a Court of Equity will never set up this dormant right in favor of a man, who has been guilty of such inexcusable neglect, and who has lain by and permitted the appellants to take up and enjoy the land.

CAMPBELL for the appellee. I shall consider the title of *Dowdall*.

1st, As it stands under the law.

2dly,

2dly, As affected by the acts of the parties.

And first, as it stands under the law. The rule laid down by the Chancellor is, that the grant has relation back to the warrant which is the inception of the title; gives authority to the public surveyor to lay off certain lands for a particular individual, and is in short the first and best evidence of a title, acquired either with, or without consideration. The grant is only *evidence* of a pre-existing right. But the objection to this commencement of our title is, that a forfeiture had in the mean time incurred, and therefore, a relation to the warrant would be improper. The forfeiture was produced by a non-compliance with the rules of the office; but what were those rules? One witness speaks of them as having been written in one of the entry books in *lord Fairfax's* office, requiring persons to compleat their titles within six months. Another, speaks of an advertisement of the *Proprietor's* in 1765, requiring all persons having claims to grants, to come in before September 1766, pay the fees and composition, and receive their grants. Another witness, speaks of an advertisement between the years 1740 and 1746 to the like effect, but fixing no time within which the parties were required to compleat their titles. Another witness says, that even if all these requisites had been complied with, it was in the election of *lord Fairfax* to make the grant or not as he pleased. Thus we see, that the rules and customs of the office are so vaguely stated, that no reliance can be placed in them. But the legislature, by the act of 1786, *ch. 3.* has regulated all these surveys, and referring back to the warrants and surveys, confirms the titles. But let me ask whether *lord Fairfax*, who in this respect is to be considered as a private individual, had any right to establish rules of property oppressive in themselves, and not warranted by the municipal laws of the country. He was at liberty to sell upon what terms he pleased. But having sold, he was as much subject to those laws and rules which prevail in contracts between other individuals as any other citizen was. He could not set up rules of his own to produce forfeitures not sanctioned by the common or statute laws of the land. Neither could his particular situation warrant it. If a private individual should sell land, and stipulate for payment by a certain day under any conditions whatever, he is as much injured by a non-compliance with the contract on the part of the vendee as the *Proprietor* was. Yet if the purchaser within a reasonable time should offer to pay, a court of equity would relieve against the legal consequences of his breach of contract, and compel a conveyance.

Secondly.

Secondly. How is the title of *Dowdall* affected by the acts of the parties?

The grants to the appellants, it is contended, destroys our right. But the loss of the papers which prevented *Dowdall* from caveating the appellants, was such an accident, as a court of equity ought to relieve against, and therefore the title of the appellants as opposed to that of the appellee, will be considered as if no grant had been made. It is evident that *lord Fairfax* did not suppose he was granting to the appellants lands claimed by the appellee, because it was his custom always to recite the forfeiture, where one had taken place.

But it is said that *Crap* abandoned his right. Suppose he did, does this give a right to the appellants? He once had a title which he has neither given nor sold to them. He has in short done nothing to divest himself, or to vest an interest in any other person. If he chose not to occupy it, did the appellants thereby gain a right to it? Surely not. As to notice to the appellants I consider it to be clearly proved.

MARSHALL in reply. It is not proved, (I conceive) that an application was made by the appellee for the papers before the transfer from *Crap* to *Dowdall*, and therefore, the argument of abandonment in *Crap* is not repelled.

It is true, that the grant relates back to the warrant, in cases unattended by circumstances which would render the relation improper; as if the sale be conditional, or relinquished, and a grant is made in the mean time to another, this relation to destroy the intermediate right could never be admitted.

As to the rule, it was entered in a book kept in the *Proprietor's* office, which was open to the inspection of all persons applying there to take up land. It is traced back to the year 1734 long before the date of *Crap's* warrant, and therefore, it was not as Mr. *Campbell* supposes, an arbitrary rule, made by the *Proprietor* for the purpose of forfeiting rights acquired under prior agreements with himself. But I ask, was not the rule a reasonable one? If dormant rights were permitted at any time to be revived, and to relate back to the warrant, no person could with safety have ventured to take up lands within that district, which would not only have been injurious to the *Proprietor*, but would have produced a great public mischief. If a grant had been made to *Crap*, he would have forfeited the land by non-payment of the quitrents for three years. Can he then be in a better situation by having violated his engagements; or ought he thus to gain a benefit to himself, and to impose an injury upon another

ther by his own default? If the forfeiture were out of the question, yet I would rely upon these considerations as sufficient to deprive *Dowdall* of the equity he asks for, upon the supposition of an implied contract. It is said, the rule appears by the evidence to be very uncertain. This is not the case. The rule itself, as taken literally from the book in which it was entered, is an exhibit in the cause. The advertisements of *lord Fairfax* were not intended to establish a rule. He had a right to avail himself of the forfeiture without giving the parties an opportunity of preventing it. These advertisements were intended as an indulgence to those, who had not complied with the rules of office, by granting them a further time to come in and avoid the consequences of the forfeiture which had incurred. But they did not alter, or do away the rule.

The act of 1786 might be objected to, upon the ground, that the legislature could not grant away the property of *lord Fairfax* any more than it could that of any other individual. But it is unnecessary to stir that question. It is evident, that that law does not mean to authorise the register to issue a patent for lands, which had before been granted by the Proprietor.

The PRESIDENT. It is surely unnecessary to labour this point, as it is too plain to be argued. The act of 1786, is not to be construed to extend to cases, where a grant had been previously made by *lord Fairfax*.

MARSHALL. As to the forfeiture not being recited in the grant to the appellants, I am inclined to think that this was never done, but where prior grants had been made and forfeited, as for non-payment of quitrents, not seating and the like; and it was done in those cases, because, if the forfeiture were not recited, the former grant might prevail over the latter. But this was not done I believe where the forfeiture accrued in consequence of a non-compliance with the rules of office in the earlier stages towards a title.

But if an actual forfeiture had not taken place, yet I contend that the conduct of *Crap* and of *Dowdall* has deprived them of all claim upon the equity of this court. This is not a contest between *lord Fairfax* and *Crap*, but between two purchasers under *lord Fairfax*. How is it, that a prior mortgagee standing by and permitting another to throw away his money upon the same security, without disclosing his mortgage, shall be postponed? The principle of that case applies to the present. For *Crap*, having notice (as is to be presumed) of the rule, and that many others might apply for a warrant to survey the same land, without

without a possibility of knowing what former appropriations had been made of it, he takes no step to perfect his title and to remove this difficulty out of the way of other applicants. *Lord Fairfax* could not have compelled those to receive grants who had obtained warrants, but the party might have abandoned the property if he pleased, and his refusing to abide by the rules of the office, was all he could do to evince his intended dereliction.

FLEMING, J.—When *lord Fairfax* established an office for the purpose of parcelling out the lands in that extensive territory, some rules were necessary, and as he differed from other individuals in the extent and nature of his property, those rules would of course be general. I think he had a right to establish such rules as he pleased, if they were reasonable. The one in question was established so long ago as the year 1734, long antecedent to *Crap's* warrant. It was, I think, considering *lord Fairfax's* situation, a reasonable regulation, and it is to be presumed that it was known to all persons, who took up land within that district of country. The revenue of the *Proprietor* depended upon his quitrents, which not being demandable before a grant was made, it was proper, that the party should within a limited time place himself in such a situation, as to render the contract as obligatory upon himself, as it was upon *lord Fairfax*, or that he should leave the property open for subsequent appropriations. *Crap*, made his entry in 1741, and died in 1773, so that 32 years elapsed, during which time he took no step towards perfecting his title. If in his life-time he had obtained a grant, he would have forfeited his estate by the non-payment of quitrents for three years, and it is unreasonable that by his own neglect, he should better his situation, and subject the other party to the contract, to an inconvenience resulting from that neglect. More especially in this case, when that other party had notified his intention to avail himself of the forfeiture unless the indulgence then held out was accepted, and the terms of it complied with, within a reasonable time. I am therefore of opinion, that the right of *Crap* was lost by his neglect, and that *lord Fairfax* might legally grant the land to the appellants, or to any other person.

CARRINGTON,—J. I consider this case to be so extremely clear, that it cannot be made more so by argument. The appellee having forfeited any right which he ever had to the land in question, by the most unreasonable negligence, has no ground upon which to establish an equity, which can entitle him to the relief afforded him by the decree. I think the decree ought to be reversed.

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The PRESIDENT.—The appellants have obtained titles to the land in question, prior in time to that of *Dowdall*, and consequently have the law in their favor. Has *Dowdall* superior equity to them, which shall warrant this court in depriving them of their legal estate? What is it he asks? That the posterior title which he acquired by his patent should relate back to the warrant, which was the inception of that title, so as to destroy the intervening right of the appellants. There are such things as relations in law, but they are legal fictions, invented for the purposes of justice, and not to work an injury to innocent third persons, who in the mean time have fairly and legally acquired a title to the subject in controversy. But if the doctrine were applicable to this case, there can be no question, but that *Dowdall* might have availed himself of it at law, and could not require the interference of a Court of Equity.

This brings us to enquire into the conduct of the parties. Has *Crap* done all in his power to entitle himself to a grant, or has he so conducted himself as to have deprived himself of such a right? If he has done all that it was necessary for him to do; then, as to *lord Fairfax*, the court would consider *Dowdall* as standing in the same situation, as if a grant had actually been made to him. But so far from it, he has done nothing which by the conditions under which he purchased he ought to have performed, and therefore he has not even acquired an equitable right. It is objected, that the rules of the *Proprietor's* office were not only arbitrary and uncertain, but were locked up in secrecy. The answer given to this was compleat: they were made as public as they could be, and were reasonable in themselves. I have always been of opinion, that *lord Fairfax* was to be considered precisely in the same situation as any other citizen. That he held his lands under the grant made to him as other citizens did. But his situation in the mode of parcelling out his lands was very different. He was the *Proprietor* of an extensive country, and therefore he could not make particular agreements with the different individuals who desired to purchase portions of his lands. On this account he established an office, employed different officers to transact the business of it, and laid down certain general rules defining the terms upon which he would grant his lands; and in forming those regulations, he appears to have assimilated them as nearly as possible to those established in the crown office with respect to lands lying in the other parts of Virginia. How can those rules be called secret, which were published in the entry books in the office,

and which were open to the inspection of all persons applying for land. It is not unreasonable to say, that *Crap* must have known of the rule. He knew that the land was not to be given; he made no special contract with *lord Fairfax* respecting it; and it therefore became necessary for him to know, upon what terms he did purchase, and in procuring this information, he must have got notice of the rule in question. Besides, he proceeded some steps in conformity with the rule. He obtained a warrant, and procured it to be surveyed, tho' not in time. As to the reasonableness of the rule it is nothing to this court; *Crap* was at liberty to purchase under it, or to let it alone, if he did not like the terms. The parties were the proper, and the only judges of this. *Crap* having surveyed the land went no farther. He paid neither fees, nor composition, and consequently deprived *lord Fairfax* of such a portion of his revenue. How then can we consider him as standing in the same situation, as if he had actually obtained a grant? It was objected, that *lord Fairfax* should have made an entry to compleat the forfeiture, or should have done some act tantamount to an entry. This might have been necessary if he had made a grant to the appellee, and the forfeiture had incurred afterwards,—as for non-payment of quitrents. It was not necessary, where the legal estate had never been out of him. But if it were, I think he did an act tantamount to an entry, by granting warrants to the two *Pickets* to survey the land for themselves. As to the custom of reciting in subsequent grants the prior forfeiture, I suppose it was similar to that which prevailed in the crown office, and there, it was never done, but in cases where there had been a prior grant.

Concerning the advertisements of *lord Fairfax*, I do not think he was in any manner obliged to give the notice for which they were intended. It was *Crap's* duty to perform the conditions which the rules of the office imposed, by paying the composition, and applying for his grant. This he was at least bound to do within a reasonable time, and before the land was re-granted. The advertisements held out an indulgence, which not having been accepted, nor the terms of it complied with, diminishes still more the claim of *Dowdall* to the relief of a Court of Equity. It is true, that the appellants did not strictly comply with the rules of the office, and of course they were liable to the legal effect of such conduct, if a warrant had been granted to another. But this was not done; *lord Fairfax*, exercising a power which belonged to him, waved the forfeiture, and as a proof that he had done so, executed grants to them. I

I think the abandonment by *Crap* is fully proved. It is true that *legal* rights once vested, must be legally divested; but *equitable* rights may be lost by dereliction.

It is unnecessary to enquire if the *Pickets* had notice of *Crap's* title, since if they had, it could not have affected them, unless *Dowdall* had been prevented by fraud from obtaining a legal title.

Upon the whole, I am of opinion that the appellants have superior equity on their side, especially against *Dowdall*, who seems to have come into the dispute as a volunteer, under an idea, that the act of 1786 had given him a chance. But it is too clear, that that act cannot apply to cases where grants had been made by the Proprietor.

THE OPINION of the COURT is, "that the appellee's grant in the year 1788, ought not to have relation to the time of the warrant, by authority of which the land was surveyed, dated in 1741, so as to be prior in effect to the intervening title of the appellants; because relation being a legal fiction adopted for the furtherance of justice, is not to be admitted in any case to produce wrong and injury to others, nor particularly in this case, where that relation comprehends a period of 47 years, and tends to establish a dormant claim in equity, never perfected by *James Crap* the elder, by paying the office fees and composition, so as to entitle himself to a grant of the land, but on the contrary forfeited and abandoned by him, and by his heir after his death, as being not worth the pursuit, in consequence of which the *Proprietor* might lawfully grant the lands to another, and accordingly did grant them to the appellants, whose conduct in obtaining their said grants and legal preference appears to have been fair and irreproachable so as to entitle them to more equity than the appellee, who became a volunteer for reviving this dormant and abandoned claim, some years after the date of the grants to the appellants, and that the said decree is erroneous."

DECREE reversed with costs, and the bill dismissed with the costs of the Court of Chancery.

JOHNSON,
against
BUFFINGTON.

THIS was an appeal from the High Court of Chancery, affirming a decree of the County Court of *Hampshire*, wherein the appellee was plaintiff. The case was as follows: *Peter Peters* in the year 1753, obtained from the *Lord Proprietor* of the Northern Neck, a warrant to survey a tract of land within that District, which by his direction was surveyed for a certain *Frederick Unrod*, an indented servant of the said *Peters's*; but by the mistake of the said surveyor, (as the bill charges,) he was called *Vinegard* instead of *Unrod*. No patent was obtained from the *Proprietor* in the life-time of *Unrod*, who died many years ago, leaving a son *Jacob*, then an infant, who was by his mother sent into *Pennsylvania*, and there bound out an apprentice; he resided in that state always afterwards, and sold his right to *Buffington* in 1770.

Johnson made an entry with the surveyor, for 219 acres, part of this land, under the act of 1783, and having obtained a patent from the Register's office in 1789, brought an ejectment against *Buffington*, and recovered a judgment. The prayer of the bill was for an injunction, and for a conveyance, both of which were decreed by the County Court, from which an appeal was granted to the High Court of Chancery. That court being of opinion, that the equitable right of the appellee to the land in controversy, derived to him from the heir at law of the person for whom the land had been surveyed, was preserved by the acts of 1786, 1788, and 1790, and consequently was not subject to the entry and location of the appellant which was posterior to the survey, affirmed the decree of the County Court from which an appeal was prayed to this court.

LEE for the appellant. Whether in a case like the present, a Court of Equity will interfere, and take from *Johnson* his legal title is an important question. The decree seems bottomed upon an opinion, that the equitable right of *Buffington* was revived and preserved by the act of Assembly passed in 1786, Ch. 3, and the subsequent act continuing the operation of that law. But before I consider the operation of those laws, I will premise some objections against the interference of the Court of

Chancery.

Chancery. In the first place, the warrant has not been so complied with as to entitle the party to claim a grant. The warrant was to survey 300 acres of land, instead of which, a plat for 450 acres was returned. Though this objection would have been done away, had *lord Fairfax made a grant*, it is now in full force where an application is made to this court to compel a conveyance. The warrant was not pursued in another instance; the length and breadth of the tract as delineated in the plat, do not bear that proportion to each other, which the warrant required. Neither are the names of the chain carriers inserted in the survey. These objections, when considered together with the neglect of *Unrod* and *Buffington*, in not perfecting this dormant title, are sufficient to deprive the appellee of the aid of a Court of Equity. It may also be seriously questioned, whether *Vineyard* in whose name the survey was made, is the same person as *Unrod*, and if so, there is an outstanding title in *Unrod* which *Vineyard* could not transfer to *Buffington*.

I come now to consider the acts of Assembly. The first which passed upon this subject was in 1785, Ch. 47. The 4th section, after reciting, that since the death of the Proprietor of the Northern Neck, no mode had been adopted to enable persons having made entries before or since his death to obtain titles for the same, declares, "that where any surveys have been heretofore made, or hereafter shall be made under entries made in the life of the said *Proprietor*, or under entries made with the surveyor of any county, under the act of Assembly aforesaid,* and which have been returned to the said Proprietary office, or shall hereafter be returned to the Register's office, the Register shall make out grants therefor, to bear teste under the hand of the Governor and the seal of this Commonwealth, in the same manner as is by law directed in cases of other unappropriated lands; and the surveyors with whom such entries have been made, are hereby directed and empowered, to proceed to survey and record the same, and to make return of such surveys to the Register's office, in the same manner, and within the same time as is or shall be directed in cases of warrants issued for other unappropriated lands within this Commonwealth, and thereupon grants shall issue in the manner herein before directed."

This law is to be construed either in a general or in a restrained sense. I contend for the latter, because of the inconvenience which would

* October 1782, C. 33.

would arise, if it were considered as intended to set up obsolete claims not carried into grant, and which were forfeited by the rules of the *Proprietor's* office; but more especially, in cases, where such claims would by relation, destroy posterior grants. The inconvenience, which the preamble of that law states, is, that by the death of *lord Fairfax*, many persons who had made surveys upon warrants issued from the *Proprietor's* office, could not obtain grants. The intention of the legislature was to provide a remedy, not for those who had forfeited their titles by a non-compliance with the rules of the office, but for those, who by the death of *lord Fairfax*, had been prevented from obtaining grants, upon entries made with the surveyors, under the act of 1782, Ch. 33, § 3, which enacts, "that all entries made with the surveyors of the counties within the Northern Neck, and returned to the office, formerly kept by the said *Thomas Lord Fairfax*, shall be held, deemed and taken as good and valid in law as those heretofore made under the direction of the said *Thomas Lord Fairfax*, until some mode shall be taken up and adopted by the General Assembly concerning the territory of the Northern Neck." The act of 1786, Ch. 3, relates entirely to surveys thereafter to be returned. The words of the law are, "that the owners of entries for lands within the District of the Northern Neck regularly made before the 17th day of October in the year of our lord 1785, shall proceed to survey the same, which surveys, together with those already made upon like entries, shall be returned into the register's office, on or before the 1st day of October 1788, and on failure, such entries are hereby declared void, and the lands liable to be located in the same manner, as other unappropriated lands within the said District."

If the legislature intended to give validity to claims which had been forfeited and entirely gone, so as to do away posterior rights fairly and legally acquired, I should question very much the validity of such a law. But the legislature is not to be presumed to have intended an act so fraught with iniquity, and therefore, to avoid such a conclusion, the court will give to the law the limited construction for which I contend.

WILLIAMS for the appellee.—Whatever exposition the court may incline to give to the different acts of Assembly, yet I contend that *Johnson* can derive no right under them. The question is between *Johnson*, whose title is acquired under the legislature of *Virginia*, and *Buffington* claiming under the *Proprietor*.
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Though *lord Fairfax* should be admitted to have possessed a right of availing himself of the supposed forfeiture occasioned by *Buffington's* not complying with the rules of the office, yet as he never did any act evincing such an intention, (as by making a grant to some other person,) the argument respecting the forfeiture cannot avail the appellant. The legislature could not by any law dispose of the rights of *lord Fairfax*, any more than they could dispose of the rights of other individuals, and consequently, *Johnson*, not claiming under *lord Fairfax*, cannot set up a title to destroy one derived under him, and still subsisting. Again, admitting a right in the legislature to dispose of the property of *lord Fairfax*, the act of 1782, which is the source, from which the inceptive right of *Johnson* flows, does not warrant the title which he now sets up. That act, provides a mode by which a right to the *unappropriated* lands in the Northern Neck might be acquired. But the land in question had been previously appropriated by *lord Fairfax*, who, had a right to waive the forfeiture if he pleased. Indeed I do not think he could have availed himself of it, since *Unrod* was an infant at the death of his father, and always afterwards resided out of this state.

I admit that where the equity is equal, and one of the parties has also the law in his favor, he shall prevail. But if the legal title has been obtained by fraud, or, as in this case, by taking an advantage of one labouring under a legal disability, he will not have the benefit of this advantage.

As to the identity of *Unrod*, I consider it to be fully established by the evidence. The objection to the variance between the warrant and the survey could only be a question between *lord Fairfax* and *Unrod*, not between the appellant, who claims under the *commonwealth*, and the appellee claiming under *lord Fairfax*.

The construction given to the act of 1785 by Mr. *Lee*, seems to me to be a very unreasonable one. For if the legislature considered *entries not surveyed* as worthy of being saved from forfeiture, a *fortiori*, they would save titles still nearer a state of perfection, namely, *entries then actually surveyed*.

LEE in reply. If it be true, that the appellant could derive no title under the legislature of Virginia, the application to a Court of Equity was unnecessary, since he might have effectually defended himself at law; and therefore the court should have dismissed the bill.

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The possession of *Buffington* is by no means a continuation of *Unrod's* possession. He was an unauthorized occupant of the land, and being there he purchased up this obsolete claim of *Unrod's*, in order to bolster up a right founded merely in possession.

FLEMING, J.—After stating the case, proceeded; the first objection made by the counsel for the appellant, was, that the survey did not pursue the warrant. But I think there is no weight in this, as the variance is only in the *quantity*. If the land had been *imperfectly* described, it might have been fatal.

The second objection was, that the act of 1785 only respected cases where surveys had not been made. I am clearly of opinion, that this act, notwithstanding the title of it, relates as well to entries as surveys, and comprehends the present case. *Unrod* (who I am satisfied is the same person as *Vinegard*) most certainly forfeited his right to a grant, if *lord Fairfax* had evinced an intention of availing himself of it, but not having done so, the land is to be considered as appropriated, and therefore, could not be regranted by the Commonwealth under the act of 1785.

CARRINGTON, J.—I have no doubt but that *Unrod* and *Vinegard* are the same persons, nor do I consider the variance between the warrant and survey, as to the quantity, as being of any consequence. The title of *Unrod* was prior to that of *Johnson*, and since it was not defeated by any act of *lord Fairfax* in taking advantage of the forfeiture, the land could not be considered as *unappropriated*, and as such subject to be granted under the act of 1785.

THE PRESIDENT.—I feel no difficulty about the variance in the name of *Unrod*, nor in the quantity of land. According to the decision in the case of *Picket* and *Dowdall*, it follows, that the right of *Unrod* was *liable to forfeiture* by the failure to apply for a grant within the time limited by the rules of the office, and by the non-payment of the composition and office fees. But as *lord Fairfax* did no act manifesting an intention to avail himself of the forfeiture, the title of *Unrod* rested upon his survey until 1786, and was confirmed by that act, which limited no time for the payment of the composition and fees. The act of 1786 relates, 1st, to entries; 2dly, to surveys not returned; and 3dly, to surveys returned, and ungranted. The act of 1788, Ch. 20, continues that of 1786, as to entries and surveys, and comprehends the three branches of the latter law.

Mr.

Mr. LEE contended that the construction of the act of 1786 might be either extended or narrowed, and supposed that the latter was most consistent with the justice of the case, and the intention of the legislature. My opinion is directly otherwise; and in this particular case, I should feel very little disposed to narrow the construction, when I consider that *Unred* was an infant for many years after the death of his ancestor, and that he resided during that time and afterwards, out of this state. It is immaterial to decide whether the commonwealth did, or did not succeed to the rights of the *Proprietor*, in cases of ungranted lands. If she did, yet no advantage has been taken of the forfeiture by her. If she did not succeed to them, then, the land was legally appropriated by *lord Fairfax*, and consequently could not under the act of 1785 be granted to any other person.

Decree affirmed:

C U R R Y,

against

B U R N S.

THIS was an appeal from the High Court of Chancery. The case was as follows: In the year 1756, *Burns* obtained a warrant from the *Proprietor* of the Northern Neck, and in 1757, after the expiration of six months from the date of the warrant, he had a survey made for 214 acres, (part of which is the land in controversy) which was returned to the *Proprietor's* office.

In the year 1768, by the direction of *lord Fairfax*, one of his surveyor's surveyed 140 acres, (part of *Burns's* 214 acres,) for *Curry*, who was at that time an infant. In September 1770, a grant issued to *Curry*, and in the month of May preceeding, *Burns* offered to pay the composition money to *Bryant Martin* the agent of the *Proprietor*, and demanded a grant; but *Martin* refused to receive the money, saying that *Burns* was too late. *Burns* obtained a patent in 1788 from the Governor of the Commonwealth, and being in possession, *Curry* brought an ejectment and recovered a judgment at law. *Burns* filed his bill in equity in the County Court of *Berkeley*, praying for an injunction, and for a conveyance of *Curry's* legal title. The County

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Court

Court decreed a perpetual injunction and a conveyance, which was affirmed by the High Court of Chancery upon an appeal.

LEE for the appellant. *Burns* having failed to comply with the rules of the *Proprietor's* office by not executing his warrant within the limited time, forfeited all the right to which the warrant entitled him, and the *Proprietor*, having taken advantage of the forfeiture by granting the same land to *Curry*, the title of the latter is good against all the world. The offer to pay the composition money in 1770, could not excuse the forfeiture which had taken place many years before, since *lord Fairfax* had in 1768, authorised a survey for *Curry*, which was made in that year, and in the grant executed to him, the survey of *Burns*, and the forfeiture incurred by him are recited. The Chancellor in this case, as in that of *Johnson and Buffington*, has supposed that the act of 1786, relates back to the warrant, and revives all those obsolete claims, which had not been carried into a grant, so as to defeat posterior rights. The patent to *Burns* was obtained from the Register's office in the year 1788, so that the construction of the act of 1788 is not a point in this cause.*

WILLIAMS for the appllee. If *lord Fairfax* from his peculiar situation, was entitled to no exclusive privileges or prerogatives, (which it must be admitted he was not,) he was equally bound with other individuals by those general rules and principles of law which prevail in cases of contracts for the sale of property. If one man agree to sell land to another, upon condition that payment be made by such a day; tho' the purchaser should not on that day pay the money, yet if in a reasonable time afterwards he is ready to comply, he may upon application to a Court of Equity compel the seller to make him a conveyance. In this case, *lord Fairfax* agreed to sell the land in question to
Burns

* SEC. 1. Whereas the law authorizing the Register of the land office to receive into his office plats and certificates of surveys that have been or shall made, will expire on the last day of December one thousand seven hundred and eighty eight, and it is represented to this General Assembly that many persons through unavoidable accidents have been prevented from returning their plats and certificates aforesaid, to the Register of the land office, whereby their lands may be forfeited: for remedy whereof, Be it enacted by the General Assembly, that the further time of two years, after the passing of this act, shall be allowed for returning the same, within which time the Register of the land office, or his deputy, shall receive all plats and certificates of survey, although not returned within the time heretofore limited by law; and and such lands shall not be considered as forfeited, or liable to forfeiture, on that account.

Burns, and received the office fees which constituted part of the purchase money. His objection to perfecting the contract because certain rules were not complied with, ought not to avail him, any more than a breach of a conditional sale in the case stated, could avail the seller. It is objected, that the survey was not returned within the six months limited by the rules of the office. Let it be remembered that the surveyors in the *Northern Neck* were appointed by *lord Fairfax* himself, and consequently that in this part of the business they were his agents and representatives. If the survey was not made and returned in time, it was not the fault of the individual, but of a servant of the *Proprietor*. *Lord Fairfax*, after he had received a part of the purchase money, might have prevented any person he pleased from obtaining a grant, by directions given to his surveyors to delay making the surveys, or by issuing so many warrants, that they could not be surveyed and returned in time. The returning of the survey was no part of the contract, but was merely directory to the officer.

But what are those rules of office which are said to be violated? They do not appear in this record, so as for the court to take notice of them.

In this case *Curry* appears to be a mere volunteer, and to have obtained the land from *lord Fairfax* as a gift. Of course he is in no better situation than *lord Fairfax* would have been. If then the *Proprietor* ought not to have taken advantage of the forfeiture, (if any such existed,) so as to grant the land again to *Curry*, the act of 1786 revives and preserves the right of the appellee.

THE PRESIDENT. - In *Picket* and *Dowdall*, the court determined, that the act of 1786 did not apply to cases where there had been a grant from the *Proprietor*.

LEE in reply. *Curry* is said to be a volunteer, but there is no evidence in the record to support the assertion. The grant to him, is the same in form, with all the other grants of the *Proprietor*; it reserves the usual quitrents, and contains the same conditions. So that this case, is not on that account to be distinguished from the case of *Picket* and *Dowdall*.

ROANE, J.—The circumstances of this case are less strong against the relief which is asked for, than they were in the case of *Picket* and *Dowdall*. For 1st, The forbearance of *Burns* in coming forward to compleat his title has not been of so long a duration as in that case. 2dly, There is no evidence of an abandonment on the part of *Burns* of his right to the land. 3dly, There

There is no proof here, farther than what is contained in the grant to *Curry*, that any advertisement had been published by *lord Fairfax* between the time of *Burns's* survey, and that made for *Curry*, requiring all those who had surveys, to come forward, and compleat their title. This is recited in the grant, and the failure of *Burns* to comply with the terms of that advertisement, is stated as the cause of the forfeiture. 4^{thly}, It does not appear that at the time *Burns* required a grant of the land, and offered to pay the composition and other fees of office, (which time I fix to be in or about May 1770), *Curry* had paid his composition money, if indeed any was ever paid by him. The grant to *Curry* was not executed until the 10th of Sept. following. In this view of the case therefore, *Burns* may be considered as having stood upon better ground on account of his priority of survey, than *Curry* did, unless by his own neglect he has lost his right to demand the legal title. It appears by a memorandum of *Richard Rigg*, that he surveyed *Curry's* land by virtue of *lord Fairfax's instructions*, there being as I presume no warrant for that purpose.

This survey was made the 20th of August 1768, and must be considered as the commencement of *Curry's* claim. Between this period, and the time of the return of *Burns's* survey, (which tho' not stated, may be presumed to have been shortly after the survey was made, viz: in Sept. 1757, there had been a lapse of near 11 years, during which time, *Burns* had wholly neglected to come forward and compleat his title. The question then is, whether after this delay, and the consequent loss of quitrents to the *Proprietor*, he had not a right to consider the claim of *Burns* as forfeited, and to grant the land to another? I will not undertake to say what ought to be considered as a reasonable time, to indulge the owner of a survey, in completing his title; perhaps every case ought to stand upon its own particular circumstances: but a delay of eleven years, unaccompanied with any exculpatory circumstances on the part of the grantee, is certainly an unreasonable time.

If a grant had been made to *Burns*, he would have forfeited his land by the non-payment of quitrents for the space of three years; by this delay, he avoids the payment of them altogether. It was in all cases important to the *Proprietor* that grants should be taken out within a reasonable time: It is presumable, that it was understood by applicants that this should be the case; and certainly, the spirit of equity does not dictate, that a party, by not performing his contract, shall be in a much better

better situation, and the other contracting party consequently in a worse, than if the contract had been duly performed as understood by both parties. I put it upon the ground of an implied contract between the *Proprietor* and the individual applying for his lands, that the legal fees should not only be paid, but that a title should be obtained within a reasonable time. On the authority of the case of *Picket* and *Dowdall*, the survey for *Curry* is to be considered as an entry on the part of the *Proprietor* to take advantage of the forfeiture. This extinguished the interest of *Burns*, and of course the grant to *Curry* pursuant thereto cannot be impeached. The court however, will judge in every case, whether a forfeiture had taken place, and if not, the entry and subsequent proceedings would be deemed invalid. The act of 1785 not having declared intermediate grants to be void, they must stand, unless they should be adjudged to be so on account of the particular circumstances attending them, and as there are none such in the grant to *Curry*, I am of opinion, that the decree should be reversed, and the bill dismissed.

FLEMING, J.—The warrant issued to *Burns*, bears date in 1756 and is surveyed in 1757, but not returned until 1770, at which time, and not before, he tendered the composition, and demanded his grant. But a survey had in the mean time, been made for *Curry*, who in September 1770, obtained a grant.

This case, tho' it differs in some points from that of *Picket* and *Dowdall*, is fully within the influence of the principles there laid down. *Burns* has certainly forfeited his right by an unreasonable delay in obtaining his grant, and *Curry*, having in the mean time obtained a legal title to the land, ought to retain it.

THE PRESIDENT. The principles which decidedly govern this case, were so fully declared in that of *Picket* and *Dowdall*, that it will be unnecessary to repeat them. It is true, the two cases differ in some points, and that difference so far as it extends, is in favor of *Burns*. The laches of *Burns* in not completing his title, is in point of time much less inexcusable than that of *Crab*. So too the tender of the composition, differs this case somewhat from that. Yet these points of difference, do not essentially affect the application of the principles laid down in that case. What may be considered as a reasonable time for the owner of a survey to complete his title, I will not pretend

pretend to say; But I accord in opinion with the other judges, that eleven years unaccompanied with circumstances is too long.

Both decrees reversed, and the bill dismissed.

W R O E,
against
H A R R I S.

THIS was an appeal from a judgment of the District Court of Northumberland, reversing an order of the County Court, giving leave to the appellant to build a mill. The land on both sides of the stream is stated to belong to him, but nothing is said respecting the *Bed of the run*. The District Court reversed the order because the writ of *ad quod damnum* was executed by the *deputy*, instead of the *High Sheriff*.

WASHINGTON for the appellant. It is wonderful that this opinion respecting the incapacity of a *Deputy Sheriff* to execute a writ of *ad quod damnum*, has so generally prevailed in this country. It is founded on a mistaken notion, that the Sheriff, in executing such a writ, acts *judicially* and not *ministerially*. It would puzzle any person I think, to state a case, in which the Sheriffs in this country act judicially. In England, they are to some purposes judges in every sense of the word, and whilst acting in that capacity they cannot delegate their authority; but in all other cases, the rule is, that they may act by deputy unless specially commanded *to go in person*. This is laid down in 4 *Rep.* 65. where a similar objection was made to a deputy's executing a writ of *Elegit*; but it was not sustained. In every instance where it has been determined that the High Sheriff must execute a writ in person, he is either required by statute to do so, as in an enquiry of *waste, partition, accedas ad curiam, Redisseisin &c*; or else he executes it in a *judicial capacity*, as in cases of *admeasurement of dower and pasture* which are *ex-contiel* writs, and not returnable; consequently, the decision of the Sheriff is judicial and final, unless the case be removed by *Pone* before the Court of common Pleas. F. N. B. 148. Clay's case 1 *Cro. El.* 10. *Dalt. Sh.* 34. So in a writ *de nativo habendo*, if it go to the sheriff to *hold plea of the matter*, he

he is judge and officer, and must therefore execute it in person; Otherwise it is, if directed to him, *returnable* into the King's Bench, for there he acts ministerially, 4 *Bac.* 441. In the case before the court, the writ is directed to the sheriff *generally*. He is to summon and impanel a jury and to charge them, and afterwards to *return their inquisition to the court*, to be there decided upon. All his acts are of a ministerial nature. He exercises no judicial function whatever in this case, more than he does in executing a writ of *Elegit*. By our law, (see *Rev. Laws* p 129) all writs and other process whatsoever are to be executed by the *Sheriff*, or by his *Deputies*; now this is certainly a *writ*, and within the general expressions of the law.

CAMPBELL on the same side. Wherever the legislature has thought proper to except particular cases out of the general law authorising deputy Sheriffs to act, a particular provision has been made for the purpose. Two cases are at present recollected. The one is where an execution issues against the property of a former Sheriff; and the other, where lands are directed to be sold for the payment of taxes. In both instances the law requires the *High Sheriff* to attend, and by doing so it distinguishes between the *High Sheriff* in exclusion of the *Deputy*, and the *Sheriff*, which means as well the Deputy as the principal.

WARDEN for the appellee. There are two errors in the order of the County Court (which have not been noticed) sufficient I think to sustain the reversal of it in the District Court. 1st, The application to the County Court for leave to build the mill, does not state that the *bed of the stream* belonged to the applicant. The words of the law are, that "when any person owning lands on one side of any water course, *the bed whereof belongs to himself or to the commonwealth*, and desiring to build a water grist mill on such lands, and to erect a dam across the same for working the said mill, shall not himself have the fee simple property in the lands on the opposite side thereof, against which he would abut his dam, he shall make application for a writ of *ad quod damnum*" &c. (see *Rev. laws* p 206.)

Now, altho' the appellant in this case owned land on *both sides* of the stream, and therefore he is not literally within this clause of the law, yet the 4th section requires the same formalities where the person applying, owns the land on both sides, as if he were seeking to condemn an acre of ground on one side, as mentioned in the first section.

2d, The jury in their inquisition, say, "they have viewed the lands above and below, and are of opinion, that no person will

will be injured by the overflow of the water, the said *Writ* ordering the lands on both sides of the run above and below, his land *above*, running farther than the water will probably flow to."

Now the jury have said nothing about the lands *below*, which may be injured, as well by the breaking of the dam, as the lands above could be by the *overflow* of the water.

As to the principal question, I have more doubts respecting it. The administering of an oath seems to be a judicial act, or at all events one; which from its nature cannot be delegated. The sheriff is to perform this solemn act; and it would seem as if it were intended to be confided to the *High Sheriff* who is always a justice of the peace, and from his mode of appointment holds a more respectable station than deputies of his own choosing.

The court stopped Mr. Campbell, who was about to reply, saying it was unnecessary.

CARRINGTON, J.—There is no weight I think in the two objections started by the appellee's counsel. Where the person applying owns the land on both sides of the stream, the presumption is, that the bed of it belongs to him, and therefore it is unnecessary for him to set it forth in his application to the court. But if he own the land on one side only, and seeks to condemn an acre on the other side for an abutment, no such presumption exists, and therefore it is necessary to state to the court, that the property in the bed of the run is in the commonwealth, or in the party applying. The 4th section of the law refers to the proceedings *subsequent* to the ordering of the writ. The words are, "in like manner if the person proposing to build such mill and dam shall have the fee simple property in the lands on both sides of the stream, yet application shall be made to the court of the county wherein the mill house will stand, for a like writ which shall be *directed, executed and returned* as prescribed in the former case."

The second objection is, that the jury have said nothing as to the injury which the lands below the dam might sustain. They have gone as far as they could. It was impossible for them to value the damage which the owners of land below the mill might sustain by the breaking of the dam; it was an accident which perhaps might never happen. They have therefore very properly left it to be decided upon by another tribunal whenever the case should occur.

I come next to consider the point upon which the District Court reversed the judgment.

The

The rule is laid down in 4 *Bac. Ab.* 440, 441, and the cases there cited, that the *Deputy* Sheriff may execute process in all cases where the *High* Sheriff is not *specially required to go in person*, or where the thing to be done is not of such a nature as to amount to a *judicial act*. Thus in an enquiry of *waste, partition &c.* the writs command the Sheriff to go in person, and consequently being commissions specially directed to himself, they cannot be executed by deputy. In two other cases which are mentioned viz. a writ of *admeasurement of dower*, and a writ *de nativo habendo*, the High Sheriff must act in person, because those writs being *vicontiel* and not returnable, he decides finally and in the capacity of a judge.

But in this case, every act of the sheriff is purely *ministerial*. The inquisition is the finding of the jury, not the judgment of the sheriff. It is returned to the court from whence the writ emanated, and it is there finally decided upon.

By the laws of this state, a general power is given to deputy sheriffs to execute all writs and process whatsoever, leaving it for particular acts to make exceptions from this general law when necessary. Consequently, we find that the legislature has thought proper to require the personal attendance of the *High Sheriff*, in cases of executions against a former Sheriff. *Rev. laws p 145.*

Upon the whole, I am of opinion that the judgment of the District Court ought to be reversed, and the order of the County Court affirmed.

LYONS, J.—The general rule is, that whatever the sheriff may do personally, he may do by deputy. But from this there are exceptions. If the act be of a *judicial nature*, he cannot delegate it to another. The case of a writ of *admeasurement of dower* is an instance of this. So if the High Sheriff be required to act *in person*, he must do so.

By our law, the sheriff is authorized generally to act by deputy unless in cases expressly excepted. The inconvenience might be very great, if the High Sheriff in cases of this sort were required to attend in person: as if two writs of *ad quod damnum* were to be executed on the same day.

This writ is directed to the *Sheriff*, which means as well the *Deputy* as the *High Sheriff*. It is a writ; and all writs may be executed by a Deputy Sheriff. It is not a judicial act; it is not a case excepted from the general authority given to Deputy Sheriffs, and therefore I can see no reason why he may not properly take the inquisition. It may not be improper also

to remark, that the general practice of the country has favored this opinion. There is no weight in the other two objections stated at the bar. I am therefore of opinion that the judgment of the District Court is erroneous.

THE PRESIDENT. The rule in England is, that where process is directed to the *sheriff generally*, and not by name, if the High Sheriff be not required by the command of the writ, or by some statute to go in person, he may act by deputy. The case of an *Elegit* is not distinguishable from the present, and tho' another reason seems to be given in Fulwood's case, 4 Rep. 65, why the deputy may act, yet a more satisfactory one is furnished by the rule above mentioned; namely, that the statute does not require the *High Sheriff to go in person*.

Our law upon this subject appears to be formed upon this rule. All process without exception is directed by the general law to be executed by the High Sheriff, or by his deputies, leaving particular cases in which it might be proper for the High Sheriff to act, for future laws to provide for. Accordingly, the legislature have thought proper in two cases which are recollected, to require the High Sheriff to act in person. As to the charging of the jury, those who make the objection ought to shew, that the High Sheriff can *ex officio* administer an oath, without a positive law to authorize it.

It was the common practice for the deputies to execute writs of *ad quod damnum* to dock intails, tho' I do not know that in any instance it was questioned.

Judgment of the District Court reversed and the order of the County Court affirmed.

GORDON,

against

FRAZIER & COSBIE.

THE case was. The appellees brought an action of debt against the appellant in the District Court of *Northumberland*, upon a penal bill for the payment of 73,000lbs of sound merchantable tobacco, inspected in the year 1780, at *Falmouth*, *Fredericksburg*, or *Port Royal*. A memorandum was endorsed

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on the bill, signed by the appellees, in the following words, viz: "Tobacco passed at *Hobbs* inspection will be received in discharge of the above bond; tobacco passed at any time within the twelve months on these warehouses to be taken." (Signed by the obligees.)

A conditional judgment being entered against the appellant and his appearance bail, the latter, set it aside and pleaded payment. At a subsequent term, the appellant withdrew the plea, and judgment by *nil dicit* was entered by the clerk, for the payment of tobacco generally, with a stay of execution, but without specifying the particular warehouses, and without giving credit for sundry payments endorsed on the bill.

The appellees at a subsequent term, petitioned the same court for a writ of error *coram vobis*, and made an assignment of errors stating "that the clerk had entered up the judgment for payment of tobacco generally, whereas it ought to have been for 73,000lbs of sound merchantable tobacco of the inspection of 1780, at *Fredericksburg, Falmouth, or Port Royal* warehouses."

The appellant pleaded *in nullo est erratum*, and concluded with praying the court to proceed to examine as well the record and process aforesaid, as the matters aforesaid assigned for error, and that the judgment might be affirmed.

To this plea, there was a general replication.

THE COURT having inspected the record and proceedings, as also the original bill penal and indorsements thereon, and the original entry of the confession of judgment, reversed the same with costs, it not being rendered pursuant to the tenor of the penal bill, and the discounts endorsed thereon not being allowed. The court then proceeded to give judgment, for the penalty of the bond to be discharged by the payment of 48,927lbs of sound merchantable tobacco, passed at the *Fredericksburg, Falmouth and Port Royal* warehouses, with interest and costs &c.

From this judgment *Gordon* appealed.

WASHINGTON for the appellant. Writs of error *coram vobis* are unusual in this country, but they are certainly useful, and the rules respecting them in England are not difficult to understand. They lie to correct misprisions of the clerk, and errors in fact, or in the process and proceedings. But if the error be in the judgment of the court, it can only be corrected by a superior tribunal. So if the error be *in fact*, it can be tried only by a jury. 2 Lev. 38—2 Bac. Ab. 215, and the cases there cited. I object therefore in the first place, that the trial was by the court upon inspection of the record, and not by a jury.

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The withdrawing of the plea, and the entry of the judgment generally, might have been done in consequence of an agreement variant from the tenor of the bill, and therefore it involved a fact properly triable by a jury.

But I rely principally, that the judgment which is given to correct a former one, is itself erroneous for the same reason that the former is alledged to have been so.

It will not be questioned I presume, but that the memorandum endorsed on the bill, is as much a part of the obligation, as if it had been inserted in the body of the instrument itself; of course, the payment might be made of tobacco at *Hobf-hole* as well as at the other three warehouses. If the court then were right in correcting the former judgment, so as to make it conform to the tenor of the bill, they were wrong in omitting the *Hobf-hole* inspection, since by doing so, the tenor of the obligation was not pursued; so that at all events the judgment must be reversed.

WARDEN for the appellee. The error in this case is obviously clerical. The judgment is confessed generally, (as the record proves,) and the entering it up is the business of the clerk, who having the bond for a guide, ought to have pursued the tenor of it. The variance from it, is certainly his mistake and not that of the court, as we all know, that the proceedings in a cause are never examined by the court at the time when the orders are read and signed by the judge.

It is contended that the trial ought to have been by jury. To this there are two answers; 1st, that the error appears obviously from the record to be clerical, and therefore there could be no fact for the jury to try. And 2dly, the plea *in nulla est erratum* confessed the fact, and therefore it was unnecessary to try it.

As to the objection stated to the last judgment, it is not easy for this court to decide that it is error. For it is impossible to say, whether the memorandum was made at the time the bill was executed or not, or by whom it was made.

WICKHAM on the same side. I admit, that if the error assigned be a matter of fact *dehors* the record, it is triable only by a jury. But in such a case the parties must by their pleadings put the fact in issue. For if the defendant in error instead of traversing the fact, tenders an issue *in law*, denying that there is error, he necessarily admits the facts alledged in the assignment to be true, as certainly, as a demurrer does in common cases admit the truth of the allegations on the other side. Thus,

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if the error assigned be that the defendant was an infant and appeared by attorney, the opposite party may traverse the fact of infancy and have it tried by a jury; or he may admit the fact, and deny that it is error, and this is done by pleading *in nullo est erratum*. So that upon the pleadings in the cause, the court, and not the jury were to decide the point in issue. But the truth is, that the error was merely clerical, and appears to be so upon the face of the record, and therefore it was properly amendable by the court upon inspection. The act of Assembly (*Rev. laws* p 118, § 21,) has prescribed the mode in which the clerk is to enter up judgments in actions on bonds; that is to say, for the penalty, to be discharged by payment of the principal, interest and costs. The confession in this case was general, but the clerk has omitted to enter up the judgment according to the rule above mentioned.

I am inclined to think that the court were right in not noticing the memorandum. It does not appear how, or when it was made. Besides, the obligor lost the election which it gave him of paying tobacco of the *Hobbs hole* inspection, by his not having made the payment within the twelve months,

WASHINGTON in reply. I admit that if the error stated had been one which was properly assignable, the plea would have confessed it. But if otherwise, the plea is considered as a demurrer *Cro. Jac.* 12. 29. 521. *Raym.* 231. *Cro. Car.* 421. But error in the judgment of the court, as I observed in opening the cause, is not assignable, nor can it be corrected by the same court.

The plea therefore confesses nothing. The error here is in the judgment of the court. The words are "therefore it is considered *by the court* that the plaintiff recover against the defendant," &c. &c. This is called the mistake of the clerk. It may be so, but it may not be so. The record states it as the mistake of the court, and there are no facts appearing to induce a different conclusion.

But I rely principally upon the other objection. The memorandum is signed by the obligees, and the bond continues in their possession. No question can exist but that a memorandum indorsed upon a deed is considered as a part of the deed, and consequently, if the amendment were properly made upon an inspection of the bond, it should have been wholly pursued, or not at all. The election given to the obligors by the memorandum is not restrained as to the time of payment, but the age of the tobacco after inspection. Mr. Wickham's argument up-

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on this point is therefore founded upon a mistaken construction of the memorandum.

CARRINGTON, J.—This case tho' depending upon a practice not common in this country is by no means a difficult one. I have no doubt but that the error complained of might have been corrected by the same court upon motion, at a subsequent term; but I should not for that reason reverse the judgment, since the party having preferred a writ of error *coram vobis* had a right to proceed in that way, tho' a shorter, and much less expensive mode might have been pursued.

The plea of the defendant concluding to the court and resting the defence upon the law of the case, is a complete answer to the objection made to the mode of trial. The error in this case appears on the face of the record to be merely clerical, and consequently, the court had a right to amend it. But in correcting two errors, there are three committed.

1st, The election given to the obligor by the endorsement (which is clearly to be considered as part of the bond,) of paying tobacco of the *Hobf-hole* inspection is omitted, as also the age of the tobacco as specified in the memorandum.

2dly, There is an error in the calculation of the ballance due, after discounting the payments endorsed on the bond.

3dly, In awarding costs to the appellees. For as the error was merely in the *officer of the court*, which the injured party might have corrected upon *motion*, it is unjust that because the plaintiff in error chose to pursue this method, the defendant should be burthened with the payment of the costs.

LYONS, J.—The only difficulty which I was under from the beginning, was whether a writ of error *coram vobis* in a case of this sort was proper, since I have no sort of doubt, but that the error might have been corrected upon motion. However, I should not incline for this reason, to reverse the judgment; but I concur in opinion with the judge who has gone before me, that the judgment itself is erroneous and must be reversed. I recollect a case, (tho' I have forgotten the names of the parties) where upon an appeal from the County Court of *Middlesex* to the District Court of *King and Queen*, a variance was suggested between the minutes and the record, and the clerk being summoned to attend the District Court with his minute book, and the variance appearing, he was directed by the Court to amend the record, and this proceeding was sanctioned upon an appeal to this court.

THE

THE PRESIDENT. The first objection stated by the appellant's counsel was, that an error in the judgment itself, could not be corrected in the same court. This was admitted to be law by the counsel on both sides. It was then contended, that the error complained of in this case was in the judgment of the court. In form, it is so; and though the proceedings as drawn up by the clerk, are read over in court, and *where there has been a trial*, the same are then corrected, yet this is not done where *a judgment is confessed* as it was here, for in such case, the act of Assembly furnishes a rule by which the clerk is to enter up his judgment. There is no doubt, but the court may amend upon motion where a mistake is committed by their clerk, if it there be, as in this case there was, something to amend by. Yet the party was at liberty to pursue the present mode if he chose to do so.

As to the correcting judgment, it is clearly chargeable with the three errors which have been mentioned. Upon the subject of costs I feel some difficulty. It is clear that the court had a power to correct the error upon motion, and therefore it was unnecessary to apply for a writ of error. The former practice (where notice is given of the motion to the adverse party) is upon every principle to be preferred; yet we should not for this reason quash the writ, since the party was at liberty to pursue either mode. Yet it would be unjust, that *Gordon* should pay the costs unnecessarily incurred in correcting the mistakes of the clerk. But I was somewhat perplexed as to the law respecting this subject, writs of error *coram vobis* being so unusual in this country, as not to come fully within any of the acts relating to costs.

This case occurring in the year 1790, the act of 1792, Ch. 66, § 64, (see *Rev. laws* p 87) cannot have any influence upon it. The District Court law passed in 1788, Ch. 67, § 73, refers this subject to the law enabling the General Court to settle and adjust costs. Upon examining that law (passed in the May session of 1783, Ch. 40, *Chan. Rev.* p. 207) the General Court are authorised in cases of appeal, writs of error, superseas or certiorari *from the inferior Courts* to award costs. This applies not to writs of error *in the same court*. We then assimilated this to the cases of motions, where, by the same law, the costs are discretionary. Yet this discretion is to be exercised with reason, and as I am clear that it was unreasonable to award costs in this case, I am of opinion, that the judgment is erroneous upon this point also.

Judgment

Judgment reversed with costs, and entered for 146000lbs of tobacco, the debt in the declaration mentioned, and the costs of the appellee in the District Court expended to the time of entering the first judgment, but to be discharged by the payment of 49,085 $\frac{1}{2}$ lbs of sound merchantable tobacco inspected either at *Fredericksburg, Falmouth, Port Royal or Hob-hole* warehouses with interest &c. and the costs of the first judgment.

HARRISON Executor of MINGE,
against

Margaret Field Executrix of James Field.

THIS was an appeal from the High Court of Chancery. The case was.—The testator of the appellee having loaned to *William Claiborne* a sum of money, he, together with *Minge* as his surety executed a *joint bond* to the testator for payment thereof. The bill states, that the testator of the appellee did not discover until after the death of *Minge*, (who was survived by *Claiborne*) that the bond was *joint* instead of *joint and several*. That *Claiborne* was at that time and is now insolvent; that the loan was made entirely on the credit of *Minge*, and that the bond was executed at a time when *Field* was not present. The object of the bill was to recover the debt from the executor of *Minge*.

The appellant demurred to the relief sought, and assigned as cause thereof, that by the appellees own shewing, the bond was joint, and that *Minge* died in the lifetime of the other obligor. He also answered, asserting that *Claiborne* was in good circumstances when the loan was made; and avers that he neither knows nor believes that the loan was made on the credit of *Minge*, or that the bond was made a joint one by mistake or fraud.

The demurrer coming on by consent to be argued was overruled, and commissions for taking depositions were awarded. But the cause being brought on during the same term for a hearing upon the bill, answer, and bond, a decree was pronounced that the appellant out of the estate of *Minge* in his hands to be administered should pay to the appellee, the principal money due by the bond (reduced according to the scale of depreciation) with interest and costs.

From

From this decree *Harrison* appealed.

COPLAND for the appellant. The appellee having lost her remedy at law, a Court of Equity can upon no principle revive the duty, unless the bond were made joint by fraud, mistake or the like. If a Court of Equity can do this, it can supply the want of a seal, or bind heirs tho' not named in a deed; in short I know not what the omnipotence of that court may not do. Except cases, in which trust, accident or fraud are mingled, a Court of Equity cannot change the settled principles of law.

STARK for the appellee. The relief afforded by the Chancellor in this case, is founded upon well established principles which prevail in Courts of Equity. Though the *remedy* be gone, the *duty* in conscience still exists, and a Court of Equity will look back to the contract which preceded the evidence of it, and give it validity. The moral obligation to pay, cannot be done away by any accident destroying the evidence of that obligation, or which discharges the party from the *legal remedy* against him. The claim of a *surety* to be freed from this relief is not well founded, since in all cases the loan is made, or will be presumed to have been made upon the faith and credit of the surety. Questions of this sort in the courts of England seldom occur, since almost all bonds in that country are accompanied with letters of attorney to confess judgment, and disputes like the present are never heard of, but when applications are made to correct irregularities in entering up the judgments. The bill states that the bond was drawn by *Claiborne* in the absence of *Field*, and this is not denied in the answer. The case of *Action and Peirce* 2 Vern. 480, affords an instance where a Court of Equity will grant relief, tho' the remedy is gone at law. In this case, it was even afforded against an *heir* who was not bound at law. The case of *Simpson and Vaughan* 2 Atk. 32, seems to be in point, and it establishes the principle I contend for; namely, that the court consider the *contract* as distinct from the *evidence of it*. In that case, a joint bond was given which does not appear to have been so made by fraud, or accident, and yet the executor of the deceased obligor was bound. The Chancellor presumed the bond was drawn by an unskilful hand; in this country it is notorious that they are generally drawn by such persons. *Bishop and Church* 2 Vez. 101, tho' it differs from the present case in one circumstance viz. that the obligatory part is *joint*, and the condition *joint and severa*; yet it establishes the principle laid down in *Simpson and Vaughan*. *Probart and Clifford*, cited in 2 Vez. 102, is also a strong case.

We know that equity will set up a lost bond even against a surety, tho' the remedy be gone at law. So if A and B were bound in a bond to C, who should make the wife of one of the obligors his executrix, this would at law be a release to both obligors, yet a Court of Equity would relieve: But if I am wrong upon this point, the court will, if the decree be reversed, send back the cause, that the parties may have liberty to take depositions, as the case was heard at the same term when the demurrer was over-ruled, so that the plaintiff below had not an opportunity to prove such facts as might give a different complexion to his case.

COPLAND in reply. It is not true that a Court of Equity will afford relief in cases where the remedy is gone at law, merely because there exists a moral obligation on the party to pay. Thus, where there is a deficiency of personal estate, that court, no more than a court of law can subject the real estate to the payment of a debt however justly due. The case of *Acton* and *Peirce* is unlike the present, because in that, the intention of the parties and the mistake in the deed were apparent. *Simpson* and *Vaughan* is bottomed upon *the loan having been made to both obligors*, and consequently, the contract, which preceded the execution of the bond, was equally obligatory on both, and imposed on both a moral obligation to pay. This is the very ground of the Chancellor's opinion. In that case, the survivor became a bankrupt; and tho' in this case it is charged in the bill, that *Claiborne* was at the time insolvent, or afterwards became so, the fact is neither admitted in the answer, nor established by proof. The case of *Heard* and *Stamford*, *Forrest* 174, is in principle very much like the present.

As to Mr. *Stark's* expectation, that if this court should reverse the decree, the cause will be sent back for depositions to be taken, it need only be remarked that the hearing of the cause without depositions was by consent of parties.

ROANE, J.—In this case there is no evidence that the bond was made a joint bond by fraud or mistake, or if any such did exist, that *Minge* was privy to the same. The chance of survivorship was equal, and *Minge* was willing to submit to the legal consequences of such a bond. There may possibly exist reasons with an obligor for preferring a joint, to a joint and several bond, and it is impossible for this court to decide whether such reasons did, or did not prevail with *Minge*. The law is laid down in the case of *Towers* and *Moor*, 2 *Vern.* 99, that in a joint bond, the duty survives against the surviving obligor.

The

The case of *Simpson* and *Vaughan* goes expressly upon the lending being to both of the obligors. A moral obligation therefore was imposed upon both by the contract, to pay the debt, and if by the form in which the bond was drawn the remedy was gone at law, the court thought it equitable to relate back to the moral obligation which was equally strong on both of the obligors. But in this case, the security was under no moral obligation, not having been a borrower of the money, and was only bound by the bond itself; no antecedent contract therefore subsisted between him and *Field* whereon to found an equity for the extraordinary interposition of the Court of Chancery. The case of *Bishop* and *Church* also goes upon the lending being to both of the obligors. I will not say that there may not be circumstances which would subject even a security to the relief now sought for, but I am clear that the present case is totally destitute of them, and therefore I am of opinion that the decree is erroneous.

FLEMING, J.—In the cases of *Simpson* and *Vaughan*, and *Bishop* and *Church*, the obligors were partners in the business; both had the benefit of the money lent, and the survivor became bankrupt. A stronger case could not have occurred to warrant the equitable relief granted by the court. In the latter case, the Chancellor postponed a decision of the cause, that enquiry might be made into the neglect suggested against the obligee, and it is highly probable that if it had been proved, he would have dismissed the bill. In this case *Field*, if he could upon any ground have been entitled to the relief he now asks for, would come in to a Court of Equity with a very bad grace, after lying by so long as he has done, until *Glaiborne*, the principal, has been reduced in his circumstances, and as the answer suggests is now unable to pay. Upon the whole, I am of opinion, that *Minge* was a mere surety, not bound at all in conscience, and his executor being exonerated at law ought not to be charged in equity.

THE PRESIDENT. The case of *Alor* and *Peirce* in principle has no application to the present. A husband upon his marriage agreed to leave his wife £1000 if she survived him; a bond for this purpose was drawn by an unskilful hand, and was made payable to the wife, with condition to leave her the £1000. In this case, the husband was by his agreement, and for a consideration deemed valuable in law, a debtor to the wife, and under a moral obligation to pay. Tho' the remedy was gone at

at law by the intermarriage, and that, in consequence of the unskillfulness of the drafts-man, yet the husband's conscience was bound, and therefore the court very properly considered him as a trustee for the wife. The principal contended for by Mr. *Stark*, that a loan creates a moral obligation to pay, which being a duty antecedent to, and independant of the bond, cannot be discharged by the loss of the bond, or by other accident is true, *as to the borrower*, and the cases of *Simpfon* and *Vaughan*, and *Bishop* and *Church* are decided upon this ground only.

The Chancellor indeed in *Simpfon* and *Vaughan* is made to say, that no stress was laid upon the circumstance of the obligors being partners. But this is certainly a mistake of the reporter, for in the case of *Bishop* and *Church*, the counsel, speaking of *Simpfon* and *Vaughan* says, "the consideration your lordship went upon, was, that it was a sum lent to both, of which both had the advantage, and a debt arose against both from the nature of the transaction." In this assertion he is not contradicted by the Chancellor, which would seem to prove that the lending and borrowing was the ground upon which the decision in that case was bottomed. The principle then of these cases has no application to the present. The surety received no benefit from the loan; he was bound by no contract express or implied, antecedent to the bond; he was under no moral obligation to pay, and of course equity would not bind him farther than he was bound at law.

It is a maxim, that where equity is equal, he shall prevail who has the law in his favor, and the cases cited in Francis's maxims of equity p. 71, as an illustration of the principle are very strong indeed, to shew that a surety has equal equity with the obligee, and being discharged at law, equity will not charge him.

It is true a Court of Equity will set up a lost bond against a surety, but the reason is, that the surety is not discharged by the loss of the bond, and the court only relieves against the accident by setting up the *evidence* of the debt.

It was argued that it did not appear that *Minge* was a surety. This is a fact not to be disputed, since the bill itself so states it. Bonds are sometimes so drawn that it is impossible to distinguish the surety from the real debtor, but when distinguished by proof, the uncertainty arising from the face of the instrument can make no difference in the principle. Since the act of Assembly which gives to sureties a summary remedy against their principals, it might be well to distinguish in the bond, the one from the other.

It

It was contended that the demurrer admitted the truth of the allegations in the bill. It is true that a demurrer without an answer does admit the facts charged on the other side, but if the defendant also answers and denies the allegations of the bill, as the defendant has done in this case, it cannot be said that they are acknowledged. When the demurrer was overruled, general commissions for taking depositions were awarded, of which the plaintiff might have availed himself if he had wished to establish any facts important to his cause. But instead of this, he appears to have consented to bring on the cause for a hearing without testimony, and therefore there is no ground for giving him an opportunity now of taking depositions.

THE OPINION of the COURT is, "that the testator *David Minge* having been neither the borrower, nor the user of the money lent to, and used by *Claiborne*, but a security only, ought not in equity to be further or otherwise bound than he was bound by the contract at law; and no fraud or mistake appearing to have occurred in the writing of the bond, it is to be considered as a joint obligation and subject to the legal consequence of *Minge* and his representatives being discharged by the death of him in the life time of *Claiborne*, and that the said decree is erroneous."

Decree reversed with costs and the bill dismissed. J

C O L E,
against
S C O T.

THE only question in this cause was, whether the vendor of land sold and in possession of the vendee, but not conveyed, has a lien on it, so as to secure the payment of the purchase money. In this case, the Chancellor dismissed the plaintiff's bill which was brought to subject the land to the payment of the money for which it had been sold.

STARK for the appellant. I consider this question as completely settled by the cases of *Chapman vs Tanner*, 1 Vern. 267. *Pollexfen and Moore*, 3 Atk. 272—*Walker and Preswick*, 2 Vez. 622—*Cator and Earl of Pembroke*, 1 Brew. Ch. Rep. 301—*Blackburn and Gregson*, 1b. 420. In *Hansen and King's heirs*,
in

in the former Court of Appeals, and in *Lidderdell's heirs vs Pettis's executor* and others in the Federal Court, in all of which the lands were decreed to be sold for payment of the purchase money.

ROANE, J.—The question which this record presents to the court is whether the vendor of land which he has not conveyed, has such a lien upon it, as that he may apply to a Court of Equity for a sale to supply the deficiency of the personal estate in paying the purchase money?

Upon an examination of the cases cited at the bar, the law seems to be settled, that where land is sold and no security taken, nor money paid, the vendor retains a lien, and the rule must be the same, where a part of the consideration has been paid, as in this case. The authorities appear to be uniform in establishing this doctrine, *where no bond is given for payment of the money*. In the case of *Blackburn vs Grogan*, Brown's *Ch. Rep.* 420, all the former adjudications upon the subject are brought into review before the court, and the circumstance of a bond being given, seems not to have been considered as important. However, I shall give no decision myself upon this point, as there is no bond in the present case. The doctrine seems also settled by the case of *Hansen and King* in the former Court of Appeals.

Upon the whole I am of opinion that the land is liable, and the decree consequently erroneous.

FLEMING, J.—It is clear in this case, that there is no personal estate in the hands of the executor to pay the balance of the purchase money remaining due, and I consider the law as settled, that the vendor has a lien upon the land. I concur in opinion.

THE PRESIDENT. If this were a new case, I should feel no difficulty in making it a precedent. But the doctrine, that a vendor of land not taking a security, nor making a conveyance, retains a lien upon the property, is so well settled as to be received as a maxim. Even if he hath made a conveyance, yet he may pursue the land in the possession of the *vendee*, or of a purchaser *with notice*. But if he hath taken a security, or the vendee hath sold to a third person without notice, the lien is lost. In this case however, there was no conveyance made, and the land is now in possession of volunteer claimants under the vendee.

THE OPINION of the COURT is “ that the appellant
“ not having conveyed the land, nor taken any security for the
“ balance

"balance of his purchase money, hath a lien upon the lands in the hands of the appellees for satisfaction of such balance."

Decree reversed.

TERRELL Executor of HOLT,
against

ATKINSON'S Executor.

THIS was an appeal from a judgment of the District Court of *Williamsburg* rendered in favor of the appellee on a bill of exchange. *Plea, nil debet.*

The only question was, whether *proferit* of a bill of exchange in an action of debt were necessary? In this case it was not made.

WICKHAM for the appellee contended, that it was not necessary, but that if it were, the statute of Jeofails cured it after verdict.

THE COURT affirmed the judgment.

PAYNE,
against
ELLZEY.

THIS was an action of debt brought in the County Court of *Fairfax* by *Payne* against *Ellzey* upon a prison bounds bond, given to the sheriff by *Ellzey*, as surety for *Gardner*, in the penalty of £ 24 : 8 : 3, and 28c4lbs of tobacco. The damages laid were £ 10.

On *oyer* of the bond and condition, the defendant pleaded "that he was not guilty of the premises laid to his charge." Replication, protesting that the defendant is guilty, and assigns as a breach of the condition of the bond, "that the said *Gardner* did not constantly keep himself within the bounds of the jail until he paid the debt and costs in the condition mentioned, according

ing to the force and effect thereof." Rejoinder, that the said *Gardner* is not guilty of breaking the bounds of the said jail without paying the said debt and costs according to the form and effect of the condition of the said bond and tenders an issue which is joined. Verdict "that the defendant is guilty, for that the said *Gardner* did not constantly keep within the bounds of the jail till he paid the debt and costs in the said condition mentioned," and assess the plaintiff's damages to £34:10:8½.

A motion was made in arrest of judgment, because the damages assessed exceeded those laid in the declaration. The errors being disallowed, judgment was entered for the penalty of the bond, to be discharged by the payment of the damages and costs, from which the defendant appealed to the *District Court of Dumfries* where the judgment was reversed and the verdict set aside, from which decision *Payne* appealed.

WASHINGTON for the appellant. The principal error assigned as cause for arresting the judgment is, that the jury gave damages exceeding those laid in the declaration. If this had been an action sounding altogether in damages, the objection would have been a substantial one, unless a release of the excess had been entered upon the record. But this is an action to recover the penalty of the bond, and by the act of 1748, the judgment is to be entered for the penalty. But there being a collateral condition, if the damages assessed by the jury be less than the penalty, the defendant may by paying the former, be discharged from the latter. The demand in this case was for the penalty, and the verdict is for a smaller sum.

LEE for the appellee. This is an action truly sounding in damages. The appellant says, that he has sustained damages in consequence of *Gardner's* having broken the prison bounds to the amount of £10. As he has himself ascertained the value of the injury, the jury have no power to give him more. I cannot discover that this case is distinguishable upon principle, from an action on the case brought to recover damages.

ROANE, J.—By the act of 1748, (*Body of laws* p. 181,) the judgment in cases like the present is to be for the penalty, tho' it may be discharged by the sum assessed by the jury. If this construction of the act wants any support, it may be derived from the case of *Collins vs Collins* 2 Burr. 824, upon the construction of the stat. 8 and 9 W. 3. ch. 11. which is precisely similar to our act as to the point in question. The penalty therefore, is that for which the plaintiff sues, and any sum below it is within the sum declared for. One reason why a judgment

ment is erroneous, which is entered for more damages than the plaintiff has declared for, is, that he best knows the extent of the injury of which he complains, and consequently can best estimate the measure of the compensation.

This reason does not hold in the present case, because the sum recovered is less than the penalty of the bond. The judgment I think ought to be reversed.

CARRINGTON, J.—This is a plain case, and I entirely concur in the opinion which has been delivered.

LYONS, J.—There are two reasons assigned in arrest of judgment. The first is, that the proceedings are irregular. This is true; the proper plea was, "conditions performed," but the issue is substantially the same and is cured by the verdict.

The second was noticed at the bar. I have always been of opinion; that in actions upon bonds for the payment of money; the laying of damages was unnecessary, for the act of Assembly declares, that the penalty may be discharged by the payment of the principle, interest and costs, saying nothing of the damages. The point was so determined in this court in a question which respected the jurisdiction of a Corporation Court.

The demand of the plaintiff in actions upon bonds of this sort, is for the penalty; the parties have agreed to make that the standard of the damages, and the judgment is entered for it, tho' by the law the obligee is compelled to receive less than the damages thus agreed upon, if less be assessed by the jury. The breach laid is for the non-payment of the penalty, and not of the damages really sustained. The plaintiff therefore may recover less, tho' not more than the penalty.

I am authorized by the PRESIDENT to say, that he entirely concurs in this opinion.

The judgment of the District Court
must be reversed, and that of the
County Court affirmed.

T

CLAIBORN,

CLAIBORNE,

against

PARRISH.

THIS was an ejectment brought in the County Court of *New-Kent* for 200 acres of land. Verdict, that the defendant was guilty as to 155 acres of the land. The judgment was entered for the 150 acres of land in the declaration mentioned. At the trial, the defendant tendered a bill of exceptions which was sealed, stating, "that the plaintiff offered I. H. as a witness, one of the persons said to be a jurymen on the execution of the writ of *ad quod damnum*, who was questioned by the plaintiff as to what he had heard *William Parrish*, one of the chain carriers on the survey made pursuant to the said writ of *ad quod damnum* say, with respect to his the said *Parrish's* misconduct in carrying the said chain, in measuring unfairly the lands mentioned in the declaration; which enquiry was objected to by the defendant as improper, but the court permitted the witness to answer the question as it related to what he had heard the said *Parrish* say. The District Court of *Williamsburg* affirmed the judgment for the 155 acres, from which the defendant below appealed.

WICKHAM for the appellant. The principle point in this cause is, whether the evidence excepted to was admissible or not?

The hearsay evidence of any person, unless it be of one of the parties (if against him) is inadmissible in a case of this sort. It does not appear that the chain carrier was upon oath at the time he made the declaration, or that he was cross examined.

I will barely mention what may perhaps be a good objection though I do not much rely upon it. The declaration is for 200 acres; the verdict finds for the plaintiff 155 acres, and the judgment is for the 150 acres in the declaration mentioned. The difference in the number of acres between the verdict and judgment may be merely a clerical mistake, but it would seem that the jury ought to have identified the 155 acres to which the plaintiff had a title, so as that it might be distinguished from the residue.

MARSHALL for the appellee. If hearsay evidence aided by other testimony could be proper, then this court, presuming that
the

the judgment below is right until the contrary appears, will suppose that there was other testimony which rendered the hearsay evidence admissible, since the party who has excepted to the opinion of the court, has not stated the contrary. It is the business of the person who would impeach the judgment of a court to state all the facts necessary for this purpose upon the record, and this is most properly done by a demurrer to the evidence.

Now in many cases hearsay evidence is proper. As for instance, if the chain carrier was examined at the trial, evidence of what he had said on a former occasion might be proved so as to impeach his credibility. It does not appear in this case, but that *Parrish* was examined at the trial, and that the examination of *I. H.* was intended to destroy the effect of his testimony.

WICKHAM in reply. I had always supposed, that tho' a demurrer to evidence must state the whole testimony, yet that a bill of exceptions was to some point, or part of the evidence, and need not set forth *what was not proved*.

The general rule is, that hearsay evidence is inadmissible; the bill of exceptions states that hearsay evidence was received and the legal conclusion is, that the court did wrong. But *Mr. Marshall* contends that there are some exceptions from the rule; I grant it. But if this case came within any of the exceptions, the party who tries to support the judgment upon that ground, ought to have spread enough upon the record to shew that the case was within the exceptions.

At present, it stands upon the record as a general proposition, that hearsay evidence may be admitted, without any thing to shew that this particular case is within any exception from the rule.

But if the chain carrier had been called upon to give testimony, it would have been improper for two reasons. 1st, That it tended to accuse himself of a fraud, if no worse; and 2dly, That a writ of *ad quod damnum* continues in force till quashed, and cannot be destroyed by a side wind in an ejectment.

ROANE, J.—It is very true, that by the general rules of law, hearsay evidence is inadmissible. The reason of the rule is so well founded and so generally known, that it is unnecessary to state it. But from this rule there are exceptions, warranted by reasons as sound as those which induced the rule itself. As in the case of proving pedigrees, and in other ancient transactions, in which it is the best evidence which the nature of such cases admit

admit of. But these cases which form exceptions from the general rule, are regulated by another, and that is, that it should appear there is no better evidence behind, and in the power of the party to produce; for otherwise, the omitting to produce such better proof, creates a presumption against the admission of inferior testimony. In this case, the objection made by the appellant is confined to the general rule, and the party who relied upon the evidence ought certainly to have stated such a case, as to shew, that tho' the general rule was against him, yet, he was within some of the exceptions: as that the transaction was ancient, his witnesses dead, and that their attendance could not be procured, or the like. But this he has not done, and therefore the general rule is against him.

But I am of opinion that if *Parrish* had been present and sworn, his testimony ought not to have been credited on account of the turpitude of his own conduct, and which his evidence was to have established; the court ought to have instructed the jury to disregard it. Most clearly then, it was improper to admit as evidence his declarations made when not on oath.

I am therefore of opinion that both judgments are erroneous.

FLEMING, J.—Concurred.

THE PRESIDENT.—In every view of this subject, I think the evidence was improperly admitted. It has been well observed, that in some instances hearsay evidence may be proper, where from the nature of the case it is not to be expected that better testimony could be procured. Such as where the transaction is ancient, and in others which have been mentioned. It was upon this principle, that the case of *Jenkins and Tom* (ante vol. 1. p 123) was determined.

But how do the reasons which authorize the admission of hearsay evidence apply to this case. The writ of *ad quod damnum* is only 17 years old, it is not stated that *Parrish* was dead, or that his attendance could not be procured. In short, there is not a single reason stated to justify us in saying that a departure from the general rule was proper. Hearsay evidence may also be admitted to shew, that a witness has been uniform, or otherwise in the testimony he gives. But nothing of this sort appears, and if there were any thing in the case to except this out of the general rule, it ought to have been stated by the court as the ground of their opinion. But if *Parrish* had been present and sworn, his evidence ought to have been disregarded by the jury: it was to prove himself guilty of a fraud against his

sworn

sworn duty as a chain carrier. Much less was it proper to admit as evidence, what he had declared when not on oath.

Judgment reversed and a new trial awarded.

STRODE,

against

HEAD, &c.

THE appellee brought an action of debt in the District Court of *Fredericksburgh*, on a bond (with a condition) payable in *Pennsylvania* currency. The declaration was for the penalty, viz. £1800 *Pennsylvania* currency, of the value of £1440 *Virginia* currency. After *oyer*, the defendant pleaded payment. He afterwards withdrew his plea and confessed judgment generally. The judgment was entered up for £1800 *Pennsylvania* currency, of the value of £1440 current money of *Virginia*, to be discharged by the payment of £720 current money of *Virginia*, with interest and costs.

From this judgment, the defendant appealed.

CAMPBELL for the appellant. Though it is certain, that if £1800 *Pennsylvania* currency is equal to £1440 *Virginia* currency, that the half of the former, must be equal to half the sum of the latter, yet as the value affixed by the plaintiff is merely arbitrary, a general confession will not warrant a judgment for the value fixed by the party himself. What the value of foreign money is, is always a fact to be ascertained by a jury, and not by the calculation of the clerk.

LEE for the appellee. The declaration having stated the value of the foreign money, the confession of judgment generally, is an acknowledgement that the value is truly stated, and renders the aid of a jury altogether unnecessary. The sum acknowledged to be due is in truth the penalty, and the permission to discharge it with a smaller sum, is an indulgence to the obligor. To do this, the condition, with the standard thus agreed upon by both the parties was properly resorted to; and as the sum in the condition, is the half of that in the penalty, and the parties have agreed upon the value of the penalty in *Virginia* currency, half that value must be the sum to which the appellee is justly entitled. But if the appellant is unwilling to avail himself

self of the benefit of the condition, I am willing to put it out of view, and to take a judgment for the very sum confessed by the defendant which is £1440. But I have always supposed that it was neither usual nor proper for the party to assign for error, that which is for his advantage.

ROANE, J.—If a verdict had been given in this case, it would have been necessary for the jury to have found the value of the *Pennsylvania* currency, since this is a fact proper for their enquiry. But the appellant by confessing a judgment, rendered the interference of a jury unnecessary, since he acknowledged that he owed the appellee £1800 *Pennsylvania* currency, of the value of £1440 *Virginia* currency. Having thus furnished a standard, the sum by which the penalty was to be discharged was easily found. I think there is no error.

The other judges concurred in opinion.

Judgment affirmed.

TERRELL,

against

LADD.

THIS was an action of debt on a bond the penalty of which was in current money, with condition to pay sterling money. Verdict for the plaintiff, and judgment for the debt in the declaration mentioned to be discharged by so much sterling money with interest and costs &c. From this the defendant appealed.

COPLAND for the appellant, objected, that the declaration being for current money and the judgment being entered to be discharged by sterling money, was error.

WICKHAM for the appellee, insisted, that the court, by the act of Assembly was directed to enter up the judgment according to the condition of the bond and therefore it would have been error to have directed a writ of enquiry. It has been decided in this court, that a judgment may be entered up for sterling money, and that the court may settle the rate of exchange.

THE PRESIDENT. The point has been frequently so decided in this court.

COPLAND. It does not appear from this record that the rate of exchange was settled by the court. WICKHAM

WICKHAM. This is always done by a general order at the end of the term, and applies to all the sterling judgments of that term without forming a part of every distinct judgment.

THE PRESIDENT. Upon an appeal, the order should be annexed to each judgment, and should appear in the record.

WICKHAM then prayed a *certiorari*, which was awarded.

Note. The general order being certified, the judgment was affirmed in April 1796.

BROWN & others,

against

The administratrix of THOMAS BROWN dec.

THIS was an appeal from the High Court of Chancery, in which the only question was, whether the master ought to have allowed an *item* in an account upon the evidence offered to prove it. The appellants who were the plaintiffs below are the children of *Samuel Brown*, to whom *Wentworth* was administrator. He settled his accounts of that estate under an order of the County Court, admitting himself to be a debtor to the amount of £ 386: 10: 1. After his death, his wife was appointed his administratrix, and at the same time, *Thomas Brown* was appointed guardian to the appellants. After the death of *Mrs. Wentworth*, *John Day* qualified as administrator *de bonis non &c.* of *Wentworth*, whose estate was by a decree of the County Court in an amicable suit commenced for that purpose, divided amongst his children, one of whom was the wife of *Thomas Brown*. On *Wentworth's* books is an entry made by *Day* in the life-time of *Mrs. Wentworth* the administratrix, charging *Thomas Brown* with £ 386: 9: 1, paid him as guardian of the plaintiffs on account of *Wentworth's* estate. *Day* is dead, and his hand writing proved. *Thomas Brown* on his day book debits himself with £ 155: 9: 1, received by him on account of his wards. But tho' all other entries from this day book are posted on his ledger, the sum of £ 155: 9: 1, is not carried to account there. It appears that an order was made by the County Court, directing a summons to issue to the said *Thomas Brown*, to settle his guardianship accounts, but nothing farther was ever done

done in the business. The defendant's exceptions to the master's report which allowed this sum of £386: 10: 1, to the debit of *Thomas Brown's* estate, with interest thereon from 1768, when the credit was entered by *Day* being sustained by the High Court of Chancery, an appeal was prayed from the decree founded thereon to this court.

RONOLD for the appellant. *Day*, if living would have been a good witness at the time he made the entry, and his evidence is not destroyed by his afterwards becoming the administrator. But if I am wrong in this, the law is well settled, that if a witness were once competent, and afterwards becomes interested, his hand writing may be proved. In this case, the hand writing of *Day* being established, his entry ought to have been considered as evidence. Besides, if *Brown*, when summoned to settle his accounts had done so, there would have been no necessity of resorting to this evidence, and consequently slighter proof should be received to charge him.

MARSHALL. The rule is, that the best evidence which the nature of the case will admit shall be required, and not as Mr. *Ronold* supposes, the best evidence which it is in the power of the party to produce. This case from its nature admits of conclusive testimony. *Wentworth*, it is admitted, once had this money in his hands;—it is contended that he is discharged of it, and that *Brown* is chargeable because he was appointed the guardian, and in *Wentworth's* books an entry was made by *Day*, of the money being paid over to *Brown*. Now this is a case where *Wentworth* might, and as a prudent man ought to have taken a receipt, and therefore the entry is not the best evidence which the nature of the case would have admitted. *Wentworth* himself could not have been examined as a witness to discharge himself and to charge another. Can his entry then be admitted, or is the case stronger, because the entry is made by *Day*? The evidence of his hand writing proves only that he made the entry, but it does not establish the fact to which the entry relates. As to *Brown's* misconduct in not settling up his guardianship accounts, he might have been punished for not doing so, but it does not authorise the establishment of a principle as to him, which is repugnant to the rules of evidence when applied to general cases.

RONOLD in reply. I do not contend that the entry of the party himself would be evidence; but it is sufficient if made by a third person, and his hand writing proved. It is like the case of a book keeper, whose hand writing may be proved after his death,

death, to establish entries, with which perhaps he was himself totally unacquainted.

THE COURT delivered the following opinion and decreed viz. "The court is of opinion, that the exhibits stated in the record are not only corroborative of the entry made in *Wentworth's* books by *John Day*, the clerk, or agent of *Mary Wentworth* the administratrix; but are abundantly sufficient independent of that entry, to charge *Thomas Brown* with the whole £ 386 : 10 : 1. The demand against *Wentworth's* estate was ascertained by his administration account duly settled and recorded, so as not to admit of doubt or litigation: *Thomas Brown* the same day, on which administration of that estate was obtained, is appointed guardian to *Samuel Brown's* children with a view, it would seem, to the receiving of this money before that estate was divided: There appears to have been so little doubt of the personal estate (of which there is no account) being sufficient to pay this, and all other demands, that *Brown* himself who married a daughter of *Wentworth*, with the husbands of the others, immediately commenced an amicable suit in Chancery to have a division of the lands and slaves: an order for such division is accordingly made and carried into execution, comprehending 17 slaves, which at their stated value, amounted to much more than this demand of *Samuel Brown's* orphans, and were liable thereto if the personal estate were not sufficient. Hence it appears that this money either was received by *Thomas Brown* the guardian, or he was guilty of gross neglect of duty, either of which would be a proper ground for charging him therewith. That he did receive it, is highly presumable from the circumstances before stated, and from that of his having entered in his memorandum book, the receipt of so considerable a part as £ 155 : 9 : 6, without having returned an account thereof to court as his duty required, or even carrying it to account in his own books, either to the credit of a general account with *Samuel Brown's* estate, or to the credit of each individual child, although such accounts appear to be open on his books, and although it is stated that he had posted from the memorandum book all other entries made at the same time. That therefore his estate ought to be charged with the whole £ 386 : 10 : 1, as received in May 1768, accountable to each child for one third thereof, with interest. But since the accounts of disbursements for their maintenance, appear to be inadequate to that purpose, and probably de-

“fective, and the interest of the money a very moderate allowance, the court is of opinion that the interest with each child shall commence from the time when he or she attained the age of 21 years or married, till which period the interest shall be set against the maintainance, and all the accounts of his disbursements for the latter discarded, unless the plaintiffs can make it appear before the commissioner, that they derived part of their maintainance from some other source than from their said guardian, in which case the charge of interest is to be made against him, and he to be allowed his accounts for maintainance. The decree is reversed with costs, and the cause to be remanded to have the accounts reformed, and a final decree made according to the principles of this decree.”

BENNET,

against

THE COMMONWEALTH.

THIS was an appeal from a judgment of the District Court of *Dumfries*, quashing an inquisition taken between the *Commonwealth* and the appellant, which found “that the appellant was a *British subject*; that he had since the peace of 1783 sold the land in question to citizens of this country, and that the *Commonwealth* hath no right to the same by way of escheat or otherwise.” This inquisition was signed by 17 jurors.

The only question in the cause was, whether the jury might be composed of a greater number than twelve?

LEE for the appellant, cited 3 *Blac. Com.* 258—*Finche’s* law 323, 4, 5, to shew that in inquests of this sort, no determinate number was required. That it might consist of twelve, or more, or less.

ROANE, J.—The quotations from the 3 *Blac. Com.* 258 are completely decisive, that no determinate number of jurors is requisite in questions of this kind by the English law, and no act of our Assembly prior to the year 1794, has altered the common law in this particular.

The act of 1794, to amend the act concerning escheators, after premising that a contrariety of opinions had prevailed as to the construction of the act of 1792, goes on to limit the number of

of jurors to serve upon an escheator's inquest. I have looked into that act, and find nothing which can warrant an opinion that any specific number of jurors were required, prior to the commencement of the act of 1794.

I am therefore of opinion, that the District Court erred in quashing the inquisition, and that the judgment ought to be reversed.

FLEMING, J. and the PRESIDENT, both concurred in the same opinion, that the number of jurors might be more or less than twelve, until the act of 1794, and therefore that the judgment was erroneous.

HARRISON Executor of PAYNE,

against

SAMPSON.

THIS was an action of covenant brought by the appellee against the appellant in the District Court of *New-London*, upon a deed made by *Payne* to *Sampson* conveying to him a tract of land in fee simple, and containing a covenant for quiet enjoyment, and that the premises were clear of all incumbrances.

The breach assigned was, that the land was not free from incumbrances, and that the plaintiff was not permitted to enjoy it free from eviction &c. for that the possession of the said land had been recovered from the plaintiff in an action of ejectment instituted by *Agatha Payne*. Upon the plea of covenants performed, the jury found a special verdict, stating the deed &c. and that after the death of *Josias Payne* the grantor, the land was recovered from the plaintiff, by *Agatha Payne*. Judgment in the District Court for the plaintiff,—From which *Harrison* appealed.

MARSHALL for the appellee. The only question existing in the cause is, whether this action will lie against the *executors*, they not being specially bound in the covenant, and therefore it is supposed, that this being a covenant real, the action will only lie against the *heir*. I contend that though the heir is not bound unless he be particularly named, yet in all cases the *executors*

executors are, whether the covenant respect real estate, or be purely personal. I consider this point to be so plain, that it is unnecessary to cite authorities to prove it.

THE COURT affirmed the judgment, without assigning reasons.

HARVEY & WIFE, & others,

against

BORDEN.

BENJAMIN Borden being seized of a considerable real estate, by his will devises as follows, viz: "My will is, that all my lands and estates in *New Jersey* be sold, and all my lands on *Bulskin, Smith's Creek,* and *North Shenando,* and all my e. tries every where, and all my lands on the waters of *James River,* should be sold, *excepting 5,000 acres of land that is all good,* I give to my five daughters [by name] that is 1000 acres of good land a piece to every one of the said five *acres,* (meaning daughters) above mentioned, to them and their heirs and assigns for ever." He then directs all the rest of his lands to be sold as aforesaid, (excepting the tract he then lived on,) and be equally divided between his wife, his three sons and six daughters. He then appoints his three sons his executors, and empowers them to execute deeds for the lands which he had sold, and ordered to be sold. Only two of the executors named in the will, qualified. The testator was possessed of 92,000 acres of land on *James River,* as well as of other tracts on *Catawba,* a branch of the same river.

Joseph Borden the plaintiff in this cause, claiming under *James Pritchard* and wife (the latter being one of the five daughters of the testator) filed his bill in the High Court of Chancery against *Harvey* and his wife (the latter of whom is the heir at law of *Benjamin Borden,* the eldest son and executor of the said testator) for an allotment and conveyance of the 1000 acres devised to *Mrs. Pritchard* by the clause before mentioned. The bill states that *Benjamin* the younger had purchased the shares of the other four daughters, and had received a conveyance from *Worthington* the former husband of the fifth daughter, (now

(now *Mrs. Pritchard*) under whom the plaintiff claims, but that she was not privily examined as the law directs, in consequence of which his title to her share was invalid.

The answer states that the part to which the daughter, under whom the plaintiff claims was entitled, was set apart by the said *Benjamin Borden* the younger, out of a tract of 20,000 acres on *James River*; that he sold considerable quantities of land to discharge the debts of the testator, and he insists, that if the plaintiff is entitled to the quantity now claimed, it ought to be laid off out of the 20,000 acre tract.

An amended bill was filed for the purpose of making certain persons defendants, who are stated to be in possession of 2,218 acres on *Catawba*, of the best land which belonged to *Benjamin Borden* the elder, under a voluntary conveyance from their mother *Mrs. Harvey*, the female defendant, and heir at law of *Benjamin Borden* the younger, and praying to have the 1000 acres claimed by the plaintiff laid off out of those lands.

The new defendants insist, that the plaintiff ought to have his 1000 acres laid off out of the large tract on *James River*, and not out of the *Catawba* lands, as there was not in the latter tract as much land, as would satisfy the bequest of 5,000 acres, and of course that tract could not have been contemplated by the testator, in the devise to the daughters.

By the report of sundry commissioners, appointed by an order of the Court of Chancery to state the situations, ascertain the quantities, and describe the boundaries of the lands whereof *Benjamin Borden* the elder died seised, and particularly of such parts as had been allotted by *Benjamin* the younger, to any of the daughters of his testator, it appears, that *Benjamin Borden* the testator, at the time of his death, was possessed of sundry tracts on *Catawba*, amongst which was 2,218 acres, reputed to be his best land, and which the commissioners think more nearly answers the description of that devised to his five daughters, than any other.

It does not appear from any part of the record, that the commissioners who took the privy examination of *Mrs. Pritchard*, (who with her husband conveyed the land in question to the plaintiff,) were *justices of the peace*; they are not stated to be such in the commission, nor in the certificate. The deed from *Mrs. Worthington*, (now *Mrs. Pritchard*) and her husband to *Benjamin Borden* the younger, and which for want of her privy examination was void as to her, describes the 1000 acres thereby intended to be conveyed, to be on *one of the branches of James River*,
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The decree of the High Court of Chancery was as follows, viz: "That the defendants or such of them as are in possession of 1000 acres of land herein after directed to be assigned to the plaintiff do resign the said possession, and convey the said 1000 acres of land to the plaintiff at his costs, and pay to him so much of the profits of the said land since the commencement of this suit as shall exceed (if they do exceed) the value of the permanent improvements on the said land made by *Benjamin Borden* the younger, and by the defendants;" and commissioners were appointed to assign to the plaintiff one thousand acres of the land mentioned in the reports, to which *Benjamin Borden* the elder was entitled, and which is in possession of the defendants, or some of them, causing the said 1000 acres of land to be laid off by the county surveyor, in one entire parcel and in a convenient form; and to examine, state and settle the said account of profits and to estimate the said permanent improvements.

From this decree the defendants appealed.

MARSHALL for the appellant. The first question in this cause is, whether the appellee has any right at all? Secondly, whether the land decreed, best answers the intention of the testator?

1st, The act of 1748 *Ch. 1*, § 6, requires the commission for the privy examination of a *feme covert*, to be directed to two justices of the peace, which this is not. It cannot be denied; but that if the persons to whom the commission was directed were not justices of the peace, the deed could not pass the estate of *Mrs. Pritchard*, and therefore, the Chancellor has presumed, that that they were such as the law required. I cannot discover any ground upon which to raise such a presumption. The commissioners are not styled justices of the peace in the instrument itself, nor does it appear from their own certificate that they were so. If either had been the case, a presumption might possibly have been created, so far at least as to lay the other side under a necessity of disproving it. It should at least appear upon the face of the instrument that the law has been pursued, or otherwise it can have no legal operation.

2d, The testator had one tract of 92,000 acres of land on the waters of *James River* in one body. The lands which are subjected by the decree to satisfy that clause in the will are upon *Catawba*, a branch of *James River*, and it appears by the report of the commissioners that there are not five thousand acres of land in this tract. From these facts it seems to follow inevitably, that the large tract of land best answers the intention of the testator, because out of that tract 5,000 acres may be got in

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one body, and upon the waters of *James River*, sufficient to satisfy the will. Whereas the land decreed is out of a much smaller tract than 5,000 acres, and is on the waters of *Catawba*. In some parts of the will, where the testator speaks of other branches of *James River*, he calls them *by name*, clearly shewing, that he knew how to distinguish between *James River* and its branches.

STARK for the appellee. In no instance do commissions for privy examinations name the persons to whom they are addressed as justices of the peace, and if they did, it would not prove that they were so. Neither would the fact be established if the commissioners were to stile themselves so in their certificate. The Chancellor was right in presuming that they were magistrates, because the law required them to be so, and if they were not, it was easy for the appellant to repel the presumption by positive proof.

2d, It appears that *Benjamin Borden* the younger, disposed of all the good land out of the large tract, and having a general power to sell, under the will, he deprived the appellee of the power of resorting to that tract, even if it had best answered the description. The land on *Catawba* is in the possession of persons claiming under his heir as *volunteers*, and therefore they are in no better situation, than he would have been himself. The testator it is proved had not in any of his tracts 5,000 acres of good land *in a body*, and because that quantity cannot be found in one tract, is the appellee to have no land at all? We are then to come as near it as possible, and however hard it may be upon the appellants, that their land should be taken, yet it is to be attributed to the conduct of their ancestor who has caused it by disposing of all the other good lands.

CAMPBELL on the same side. The objection to the appellee's title seems to be built upon a misapprehension of the act of 1748, which is merely directory to the clerk, and does not require that the persons named in the commission should be therein stiled, "justices of the peace." The words of the law are "that it shall be lawful for the clerk to issue a commission to two or more commissioners *being justices of the peace*," &c. Whether justices or not, is a fact capable of proof, and the court will presume they were so, until the contrary appears.

Benjamin Borden was bound as executor and trustee, to reserve 5,000 acres of land, all good, for the five daughters. He did reserve lands on the *Catawba*, tho' not all in a body, nor does the will require it. Nay, it appears that that quantity of
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good land in a body could not have been found in the estate of the testator. But it is said, that the appellee ought to receive his quantity out of the 92,000 acres of land. *Benjamin* the younger, has disposed of this land, and therefore it is holden either by purchasers for valuable consideration, or by volunteers, as the *Catawba* lands are holden. If the former, we cannot touch them. If the latter, may they not object to our claim with as much reason as the present appellants do?

The report of the commissioners appointed by the Chancellor to view the lands, leave no doubt, but that those on *Catawba* will best satisfy the intent of the testator, and to that report there is no exception.

MARSHALL in reply. There is no proof that the 92,000 acres are sold. But if there were it does not alter the question, which is, do those lands answer the description given by the testator, better than the *Catawba* lands? I contend for the reasons first mentioned that they do, and if so, and by the conduct of *Benjamin Borden* the younger, such land cannot be obtained by the appellee as he is entitled to by the will, then his claim for compensation will be against the estate of *Benjamin Borden*, and not against a part of his representatives, who by this decree are to bear the whole loss.

The opinion of the commissioners will not carry the claim from the 92,000 acres, if that was the tract contemplated by the testator. A part of this tract must at any rate have been taken to satisfy the devise, since there were not 5,000 acres on *Catawba*.

ROANE, J.—This is a plain case, and though contained in a voluminous record, the essential parts of it, lie within a small compass. An objection is made to the title of the appellee, because the commission which was to enable *Mrs. Pritchard* to pass away her estate, was not directed to *Justices of the peace*. The act of 1748 requires the commission to be addressed to persons *being Justices of the peace*, but does not prescribe the form of it. It is certainly necessary that the commissioners should in *reality* answer this description, because the law requires it, but it does not require that they should be so styled in the commission. The question then is, ought we to presume the fact that they were justices? I think we ought. The law requires the clerk to direct it to such persons, and he ought not to be presumed to have done wrong. The contrary might have been shewn, and if the party meant to avail himself of this objection he ought to have proved the fact. I can never agree that the party should be surprised at the trial with an objection of this sort, particularly, where the presumption is in his favor. As

As to the location of the land claimed under the will, one thing is evident, which is, that the testator intended to give to each of his five daughters, 1000 acres of *good land*; and it is not required to lie in one body. But if it had been, the report proves that his intention as to *quality* could not in this respect have been fulfilled. It is to lie on the waters of *James River*, and so I think the *Catawba* lands do. But if it could be avoided, the land ought not to be laid off in small surveys, and as it is in proof that the 5,000 acres of good land could not have been got in the large tract, in less than 20 surveys, the testator could not have meant that tract. *Benjamin* the younger, seems himself to have considered the *Catawba* lands as intended by the testator. Had he then a right to purchase up all the good land, and to impose the bad on the devisees? It is shewn by the report, that there remains no good land unsold, and it would be highly unjust, that the executor should by his conduct deprive any of the devisees of that which the testator intended for them, and the appellants claiming merely as volunteers, stand in the situation of *Benjamin Borden* whom they represent. I think the decree ought to be affirmed.

FLEMING, J.—The first objection made by the appellant's counsel to the decree was, that the commission was not so directed, or returned, as to pass the estate of *Mrs. Pritchard*. It is duly executed by the persons to whom it was directed, and the clerk is required to address it to *justices of the peace*. The deed with the commission is returned, and admitted to record. I do not think that we carry the doctrine of presumption beyond its accustomed limits when we say, that to support this deed, we will intend that the law has been obeyed unless the contrary appear.

The second point respects the location of the land. The Chancellor discovering much difficulty in ascertaining what lands would best fulfill the intention of the testator, very properly appointed commissioners to view all the lands of the testator on the waters of *James River*, and to report thereupon. These commissioners had certainly the fairest opportunity of judging, and after stating that *Benjamin Borden* the executor, had sold almost all the good land out of the large tract, they report their opinion to be, that the lands on *Catawba* more nearly answers the description given by the testator than any other. I am therefore of opinion that the decree is right.

THE PRESIDENT.—I concur fully in sentiments with the other judges, and for the reasons given by them, I am of
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opinion, that the decree is right upon both points, and ought to be

affirmed.

LEE,

against

TURBERVILLE.

LEAVE was granted the appellant by the County Court of *Westmoreland* to build a mill. The appellee conceiving himself interested, prayed an appeal which was refused, because it appeared to the court that he was no party. He then applied to, and obtained from a judge of the General Court a *supersedeas* which removed the record before the District Court of *Northumberland*, where the order of the County Court was reversed, from which an appeal was prayed to this court.

LEE for the appellant. Before the court goes into the testimony which is about to be offered in support of the judgment of the District Court, I must object to the mode in which the cause was carried from the County Court. I believe it will not be contended on the other side, that there is error in the proceedings of the County Court *apparent upon the face of the record*, and therefore the appellee must expect to sustain the judgment of the District Court, upon evidence *debors* the record. If the appellee had *appealed* from the judgment of the County Court, I admit that he might have been let in, to controvert the propriety of the order, in the District Court, upon the merits of the case, and for this purpose he might have gone into testimony, because in such a case, the court might have taken cognizance of the *fact*, as well as of the *law*. The County Court having refused the appeal, the party ought to have applied for a *mandamus*, or for a *writ of error*. But a *supersedeas* could carry only *the law of the case* before the District Court, and consequently if there be not error upon the face of the record, this court must reverse the judgment.

MARSHALL on the same side. The District Court may grant a *supersedeas*, or writ of error, and may receive appeals when allowed by an Inferior Court. A *writ of error* will give jurisdiction to the court to examine into facts in the same manner as

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an appeal would, and so it was determined in the old General Court. The reason given by the court was, that as a writ of error would lie in *fact* as well as in *law*, and the power given by the act of Assembly to grant writs of error being *general*, the judgment of an Inferior Court in matters of *fact*, might properly be examined before a Superior Court upon a writ of error. But a *superfedeas* only brings up a transcript of the record, and the court is confined to such errors in law as are apparent upon the face of it.

WASHINGTON for the appellee. The reason upon which the decision in the General Court is said to have been founded, does not appear to be a sound one, in support of the distinction taken between a *superfedeas*, and a *writ of error*. In *England*, a writ of error which issues from a *Superior* to an *Inferior* Court, can authorise only an examination of errors in law. If the errors be in fact, they are examinable in the same, not before another court. A *superfedeas* in *England* is an auxilliary process, and in certain cases it is the companion of a writ of error, and does not remove the record at all. It is considered by the laws of this state, as well as by the practice of the courts, as being similar in every respect to a writ of error; Either of them have the effect of removing the record before a Superior Court. A writ of error from a *Superior* to an *Inferior* Court to correct errors in *fact*, (except in some particular cases,) is as great a novelty in this country, as in *England*, and therefore it cannot be preferable to a *superfedeas* in cases like the present, where the facts are to be re-examined before the Superior Court. They are precisely alike, when the process issues from a Superior to an Inferior Court. In no case (except such as respects *mills, wills, roads*, and the like,) can errors be examined into and corrected, which do not appear upon the face of the record. In those cases, Superior Court takes up the cause *ab initio*, and enquires into the errors both in law and in fact. It is therefore of no consequence, whether the record is removed by appeal, writ of error, or *superfedeas*.

THE COURT having suspended an opinion upon this point until the testimony was gone through, reversed the judgment of the District Court, and affirmed that of the County Court upon the evidence.

JORDAN,

JORDAN,

against

NEILSON.

THIS was an action of debt brought in the District Court of *Charlottesville* by *Neilson*, upon a note of hand for the payment of 7125lbs. of crop tobacco. On the plea of *nil debet*, the jury found a verdict for the plaintiff, upon which judgment was entered.

At the trial, the defendant below tendered a bill of exceptions which was sealed, stating, that the plaintiff produced in evidence a certain writing in these words, to wit: "I acknowledge myself indebted to *James Neilson* 7125lbs. of crop tobacco, of the *Richmond* or *Manchester* inspections, to be paid to said *Neilson* on demand, to which payment I bind myself, my heirs &c." signed "*B. Jordan*" with an indorsement as follows, viz: "Sir, I am at a loss for the prices of the articles I have taken of you, which prevents my filling up the note, which you will be pleased to do after seeing the memorandum," also signed "*B. Jordan*." That the plaintiff proved the note and endorsement to be of the hand writing of the defendant, except the following words to wit: "7125 pounds." The defendant objected to this testimony going to the jury, there being no other evidence in the cause, but he was over-ruled by the court. To the judgment of the District Court, a *superfedeas* was awarded.

MARSHALL for the plaintiff in error, insisted, that the note, upon which this action was founded having been blank when executed, ought not to have been read in evidence on the plea of *nil debet*, which is tantamount to the plea of *non est factum* in actions on deeds.

WICKHAM for the defendant. If a man sign a blank bill, or note, he puts it in the power of the person to whom it is made, to fill it up to any amount *Ruffel, vs Langstaffe*, 2 Dougl. 514. In that case, the bill was not thrown into circulation, and is therefore in principle precisely like the present. The maker of a note may fill it up himself, or delegate the power of doing so to another. By delivering, or remitting it in blank, he shews his intention to confide so far in the person to whom it is given, as to authorise him to fill it up. How this doctrine would

would apply in the case of a bond I cannot say. Perhaps from the solemnity attending the making of a deed it might be different, since it has no validity without a delivery.

The court being divided in opinion the judgment was affirmed.

SKIPWITH,

against

BAIRD.

THIS was an action of debt brought by the defendant in error against the plaintiff, in the *Brunswick District Court*, upon a protested bill of exchange. The declaration was for £120 sterling, of the value of £160 current money of Virginia, and 5/9 sterling money of the value of 7/8 current money the charges of protest, and interest at the rate of 10 per centum per annum upon the said principal sum of £120 sterling from the date of the bill. The damages are laid at £500 sterling, of the value of £666: 3: 4, current money. Upon the plea of *nil debet*, the jury found a verdict for the plaintiff, and judgment was entered for £341: 16, sterling, being the principal interest and charges of protest in the declaration mentioned, with interest thereon after the rate of 5 per centum per annum from that day, and the costs; but the said sterling money may be discharged in current money at the rate of 37½ per cent difference of exchange. To this judgment a writ of *superseadeas* was awarded by one of the judges of this court.

CAMPBELL for the plaintiff in error. This case is precisely like that of *Scott's executors vs Cash*, (ante vol. 1, p. 115) in which the court decided, that it was error for the declaration to demand the *current money value* of a *sterling debt*, which was recoverable only in sterling money.

Another objection to this judgment is, that the declaration is for £120 sterling, of the value of £160 Virginia currency, and interest after the rate of 10 per centum per annum, with charges of protest; and the judgment, instead of being entered for the principal, damages, and charges as demanded by the declaration, leaving the calculation of the interest

est to be made by the *clerk* when he issued the execution, is for the whole added together in one aggregate sum, *the court* undertaking the calculation. The inconvenience resulting from this mode of entering up the judgment is, that if a mistake be made by the court, it could only be corrected by a writ of error &c. whereas, if the clerk were to make it, the court might upon motion order it to be amended.

STARKE for the defendant. I do not recollect the case of *Scott's executor and Call*, and therefore do not know how far it governs this. The last objection is in opposition to the common practice of entering judgments upon protested bills of exchange.

LYONS, J. delivered the opinion of the court.

This was an action of debt upon a protested bill of exchange. The declaration which is in the usual form, demands the principle, interest, and charges of protest in *sterling money*, but lays the value of each in *current money*. Upon the plea of *nil debet*, the jury found that the defendant did owe the debt in the declaration mentioned *generally*, without saying that it was in sterling, or in current money. The court gave judgment for the aggregate amount of principle, interest, and charges of protest in *sterling money*, according to the act of Assembly, and at another day, they entered as usual a general rule settling the rate of exchange at which the sterling judgments of that term were to be discharged.

The first objection made to the judgment is, that the declaration having laid the value of the sterling money as if it had been *foreign money*, and the verdict being general, it should be considered as given for current money and not for sterling.

The answer to this is, that the *debt* as well as the *damages* are demanded in *sterling money*, and therefore the verdict and judgment must be for sterling money.

But it was contended, that sterling debts could only be sued for and recovered in sterling, and that the laying of the value in current money is erroneous, and for this, the case of *Scott's executors vs Call* is relied upon.

The value in current money has only been laid through abundant caution, under an idea perhaps, that since our separation from *Great Britain*, sterling money might be considered like other foreign money and to be sued for as such. But since the laws made before the revolution respecting sterling money debts are still in force, they may still be sued for and recovered, without laying the value in current money, the courts having the same

same power to settle the rate of exchange which they formerly had. But although there is no necessity for laying the value of the sterling money, yet if it be laid, it is merely surplusage, and will not vitiate the declaration.

The case of *Scott's executors and Call* was not like the present. It is true that in both, the demand was of a sterling debt, with an averment of the value in current money, but in that case, the *damages* were considered as being laid in *current money* because they were laid *generally*, whereas the demand being an entire one, and the *debt* being a *sterling debt*, the damages ought to have been in sterling money likewise, in order that the judgment for the debt and damages might be entered for the same sort of money. The court did not say, that an averment of the value of the sterling money was error, but the *demand* being in sterling money, it was considered to be improper to depart from that by laying the *damages* in current money only; and two of the judges who sat in that cause have been pleased to give this explanation of the reasons which influenced their decision in that cause.

Judgment affirmed.

SCHWARTZ,

against

THOMAS.

THIS was an action of slander brought in the District Court of *Petersburg* by the defendant in error. The parties executed mutual bonds with a condition to abide by the award of eight arbitrators, indifferently chosen by the parties, to determine all disputes between them for slanderous words spoken by the said *Schwartz* of the said *Thomas*, and to ascertain the damages which the latter had sustained or might sustain for certain slanderous words spoken of him by the former, for which a suit was then depending in the *Petersburg* court. And it was further agreed, that each arbitrator should, without consulting the others, state on a piece of paper the sum which he supposed should be allowed, and the aggregate amount being divided by the number of arbitrators, that the quotient should be the sum for which they were to render their award; this to be done in writing

writing on or before the 8th day of August following, at *Nottingham* courthouse; the said *Schwartz* to pay the costs of the said suit, if any damages should be awarded against him. That the indictment filed by the said *Schwartz* against the said *Thomas* should be no farther prosecuted, but the said arbitrators to determine in the same manner, as if the court and jury of the said District Court had determined the damages for the benefit of the *commonwealth*, the said arbitrators being requested to state in their award, the damages, if they should think any ought to be for the benefit of said *Schwartz* with costs, if any damages against the said *Thomas* on account of the indictment. Upon the bond there is a memorandum endorsed, that if any of the arbitrators should not meet, an award might be made by any number exceeding four. By a rule of court afterwards made, the parties agreed to submit all matters in difference in this suit to the determination of the above mentioned arbitrators, and that their award, or the award of any five of them should be made the judgment of the court, provided they should proceed to make the same, on or before the 8th day of August thence following, in the manner pointed out in the arbitration bonds reciprocally given by the parties. And it was further agreed, that the said arbitrators might proceed to make there award *ex parte*, if either party after 10 days notice of the time and place appointed for that purpose should fail to attend.

The arbitrators returned their award, in which, after reciting the order of court, and that in pursuance thereof they did meet, and in the presence of the parties examined the witnesses and other testimony there produced, and that they had proceeded in conformity with the said order, and in the manner pointed out by the said arbitration bonds, they awarded the defendant to pay £55 damages to the plaintiff, with his legal costs expended in prosecuting this suit. Judgment was entered according to the award.

The defendant having objected to the award before judgment was entered up, and being over-ruled by the court tendered a bill of exceptions which was sealed, stating "that the arbitrators admitted as evidence, a letter said to be written by one *Joseph White* in *North Carolina*, and directed to *F. White*, who swore before them, that he believed the said letter to be the hand writing of the said *Joseph White*, (but there was no evidence that the said *Joseph White* had ever sworn to the truth of the contents of the letter, nor was he present,) which letter induced some of the arbitrators to award greater damages than they otherwise

otherwise would have done, and the defendant produced an affidavit of one of the arbitrators to this effect: That it appeared by the affidavits of two of the arbitrators, that the said *F. White* was sworn as a witness, and deposed, that he believed the plaintiff had been injured by the slanderous report circulated by the defendant, and as a ground for such belief produced the letter in question, in which the said report was mentioned.

The cause came up to this court upon a writ of *superfedeas*.

STARK for the plaintiff in error. Although arbitrators are judges of the parties own chusing, they are nevertheless bound by the rules of law, and if it appear from the record, that they have decided contrary to those rules, the award may be set aside, more especially where the reference was made by rule of court. The letter of *White* was improperly admitted as evidence, and would have been so decided if it had been offered as testimony in court, since the *truth of the contents of the letter*, ought to have been proved by legal evidence, as all other facts must be.

Another question may perhaps arise in the cause. The rule of court refers all matters in dispute *in this suit*, and the bonds are of all matters *in differences*. The power of the arbitrators therefore is extended beyond the rule of court, which confines them to disputes in *that particular suit*. I should entertain no doubt myself respecting this objection, if the arbitrators had appeared to have acted under the general power given by the bond. It has been decided in *England*, and was so decided in this court, in the case of *Shermer and Beale*, (ante vol. 1, p. 11) that the parties could not by consent extend the time for making the award, or change the rule of court in any manner.

WICKHAM for the defendant. The decision in the case of *Shermer and Beale*, was the very reverse of what *Mr. Stark* supposes. In that case, the time for returning the award was extended from the 1st to the 20th of June.

I admit that if arbitrators make a plain mistake in fact, or in law, the award may be set aside. But this court determined in the case of *Pleasants, Shore & Co. vs Ross*, (ante vol. 1, p. 156.) that those mistakes must appear upon the face of the award, and that affidavits could only be relied upon to prove misconduct in the arbitrators. And even if the mistake appear upon the face of the award, it must be a clear and gross one to induce the court to set it aside, 3 *Ark.* 462. But I contend, that the arbitrators did right in hearing the testimony excepted to. This letter was not introduced to prove *the fact* that the slanderous words had been spoken, but that the *report had been spread*.

W

The

The witness thought the defendant had been injured by the speaking of those words, because the letter proved that the slander had circulated. If hearsay evidence can be admitted in any case, it surely ought in a case of this sort. A witness may certainly prove that he has heard the report circulating in a neighbourhood, tho' the persons from whom he heard it were not upon oath at the time they mentioned it.

STARK in reply. I admit the witness might have proved as a fact within his own knowledge, that the report was spread, but it was improper for him to prove what a third person had written respecting the existence of the report. Suppose the writer had made an *ex parte* affidavit of his having heard the report, could this have been read in evidence? And if it could not, surely his letter unattended with this solemnity ought not to have been read. If he had been present and cross examined before the arbitrators, he might with propriety have given evidence respecting the circulation of the report.

ROANE, J.—This was an action of slander, and issue was joined upon the plea of not guilty. After an ineffectual effort to obtain the verdict of a jury who could not agree, the cause was by mutual consent referred to eight arbitrators, seven of whom returned an award in favor of the defendant in error. The plaintiff tendered a bill of exceptions to the opinion of the court, over-ruling a motion to set aside the award, which states, that the arbitrators admitted as evidence, a letter, written by *Joseph White* in *North Carolina* to *F. White*, a witness sworn before them; and that the defendant also produced in court the affidavit of *F. Fitzgerald* one of the arbitrators, stating, that the said letter so admitted, induced some of the referees to give greater damages than they would otherwise have done; but that the motion was over-ruled, because it appeared from the affidavits of two of the referees made in open court, that the said *F. White* was sworn as a witness before them, and being asked, whether he believed the plaintiff *Thomas* had been injured by the slanderous report, circulated by the defendant, answered; yes, he believed he had been injured: and being further asked, what ground he had for such belief, he produced the letter above stated, in which the said report was spoken of, and declared he believed it to have been written by the said *Joseph White*. Such is the purport of the bill of exceptions, and the objection is, that the arbitrators ought not to have admitted this letter to have been read.

After

After proving the speaking of the slanderous words in an action of this sort, the next enquiry is, whether the plaintiff has been injured, and what is the extent of that injury. This depends in a great degree upon the circulation of the report, by which the character of the party aspersed may suffer in the estimation of those who have heard the slander. The only purpose for which the letter mentioned in the bill of exceptions was produced, was to prove that the report *had circulated*, and was known to the writer; the letter was not intended to prove that the defendant propagated the report, nor was it competent to establish that fact. If the letter had not only stated that the report was known to the writer, but had also averred that the plaintiff had *propagated the report*; such averment would have been inadmissible to prove this latter fact, and if the plaintiff had stated such to have been its purport in the bill of exceptions, it would have made his case very different from what it now is. But I must take it for granted upon this record, that the letter only spoke of the report as being known in *North Carolina*, and that it was merely produced to prove that it had circulated. The question then is, whether it was proper evidence for such last mentioned purpose. That the report had circulated so as to come to the knowledge of the writer, is as clearly established by the letter itself, as if he had deposed to the same effect before the arbitrators, and no cross examination could possibly do away a conviction that he who spoke of the report, had heard it. But this letter was also proved to have been written by *Joseph White*; it was therefore competent evidence for the purpose for which it was produced, and the arbitrators did right in permitting it to be read.

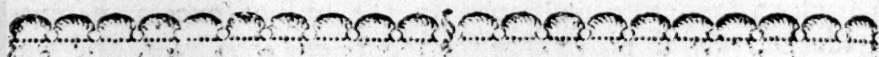
I think the judgment ought to be affirmed.

FLEMING, J.—It is true, that arbitrators ought to be governed by the same rules of evidence which prevail in courts of justice. The question then is, ought this letter to have been read in evidence if the cause had been tried in court. I am of opinion it ought. I consider this case as furnishing one of the exceptions from the general rule. The hand writing of Mr. *White* was clearly proved, and the letter was as compleat evidence of the fact for which it was produced, namely, that the report had been heard by the writer, as if he had been examined before the arbitrators, and had declared it upon oath. This case is very different from what it would have been, had the letter been produced to prove the speaking of the words, or the propagation of the report by the defendant. In the one case the party might have derived

derived benefit from the cross examination of the writer, in the present case it would have been impossible.

THE PRESIDENT concurred in opinion.

Judgment affirmed.



CASES

ARGUED AND DETERMINED

IN THE

COURT OF APPEALS

IN

THE SPRING TERM OF THE YEAR,

1796.

OVERTON & Wife, administrator & administratrix of JOSIAH HUNLEY,

against

Charles Hudson, executor of Christopher Hudson.

THIS was an action on the case, upon a general *indebitatus assumpsit*, for money had and received by the testator of the appellee, to the use of the appellant's intestate. The general issue was pleaded, and at the trial, the defendant tendered a bill of exceptions which was sealed, stating, that the plaintiffs to maintain their action, offered in evidence, a copy of a judgment obtained by the said *Josiah Hunley* against *Thomas Mumford* and the execution issued thereon, with a return endorsed, signed by *M. Roach*, D. S. "that the same was satisfied;" also a certificate, that the defendant's testator had duly qualified as sheriff, and that the said *M. Roach* had also been admitted as his

his deputy. That the defendant moved to nonsuit the plaintiff, which the court refused to direct. That he then moved, that the judgment, execution and certificate above stated, might not be permitted to go in evidence to the jury, but in this also he was over-ruled. The jury found a verdict for the plaintiff, upon which judgment was accordingly rendered. This judgment being afterwards reversed by the District Court of *Petersburg*, a *superfedeas* was applied for, and awarded by one of the judges of this court.

WICKHAM for the plaintiff. By the bill of exceptions it appears; that this action was brought to recover money levied under an execution, by *Reach*, the deputy sheriff of *Christopher Hudson*, and the question is, if a *general indebitatus assumpsit* will in such a case lie against the *high sheriff*?

It is clear, that an action of debt might have been supported, and the general rule is, that wherever debt will lie, *indebitatus assumpsit* will, unless a specialty be the ground of the action.

This is a simple contract debt, though the proof of it depended partly on a judgment. The case is not altered on account of the bond given by the sheriff for the due execution of his office, for although an action of debt might have been brought upon that bond, yet, another action will lie to recover the money levied under this execution, as for so much received to the plaintiff's use. Neither is it important that the money was received by the deputy sheriff, for in the eye of the law, it was received by the *high sheriff*.

CAMPBELL for the defendant. If there be any authorities to prove, that debt would lie against the sheriff in a case of this sort, I should wish them to be produced: I know of none such.

I admit, that great liberality is extended to the action on the case for money had and received; but it is laid under certain restraints even by the great patron of this action, so as to prevent a defendant from being surprised at the trial, by the want of notice of the real nature of the demand. This can seldom happen where the defendant is charged with the consequences of his own acts, for then, he is supposed to be conscious of all the circumstances attending them, and he ought to be prepared to explain and to justify them. But it is otherwise where the charge respects the acts of a third person; for altho' as between him and the defendant, there may exist a privity created by a legal fiction, yet the latter may be as much a stranger to the transactions of such third person, as if no such connection had subsisted; and the law will not permit a fiction to work an injury to any

any person. The deputy is liable in an action of this sort, either in his individual, or in his official capacity; the high sheriff is only answerable in the latter character, and in that character therefore he ought to have been sued.

WICKHAM. I admit that an officer is not chargeable for a *misfeasance* in himself, or in his deputy, in an action of debt or of assumpsit. But this action is for a *non-feasance* in failing to pay a sum of money levied for the appellant's use. As to the inconvenience which it is supposed the defendant may be subjected to, from a want of notice of the real ground of complaint, if it be an objection in this case, it is one which applies to this form of action in almost every other case. The court will not permit the defendant to be surprised at the trial; it is in their power to prevent it by setting aside the verdict. But it does not appear in this case, that the appellee was surprised; on the contrary, it is clear that he knew for what he was sued, because it is stated in the bill of exceptions, that he produced the sheriff's bond in evidence. The case of *Moses and M Earlane v Burr*, 1005 was much stronger than this.

The deputy is in fact the servant of the sheriff, and his receipt is the receipt of the sheriff; every thing is done in the name of the latter. As well might a merchant oppose an action of this sort by saying, that the money was received not by him, but by his clerk. Even if the deputy be liable, it does not prove that the high sheriff is not; but I doubt if the action would lie against the deputy. The case of *White and Johnson* (ante vol. 1, p. 159) seems to be a strong authority to prove that it would not.

In the case of *Speake vs Richards* Hob. 206, it was determined, that debt would lie against the sheriff for money levied by him under an execution, upon the ground of an implied contract; and this is the foundation of the action of *indebitatus assumpsit*. In the case of *Cockram vs Welby*, 1 Mod. 245, it is said, that *indebitatus assumpsit* will lie against the sheriff for money levied upon a *feri facias*.

It may occasion much surprise, that so few cases are to be found upon this subject; but the practice in England is to order the sheriff to bring the money into court, and if he fail to do so, an attachment *issues against him*. So in this country, it is most usual to proceed against him by motion.

CAMPELL. Although strictly speaking, the sheriff is liable for the acts of his deputy, yet no answer is thereby furnished

to the objection, that the declaration should be so formed as to apprise him of the real ground of the action. If debt had been brought, the whole case must have been stated: if *indebitatus assumpsit* be preferred, the declaration should be special.

It will not be denied, but that a record (which the sheriff's return certainly is) is the foundation of this action, and where this is the case, the record should be certainly, and truly alledged, 1 *Esp.* 238. "No such record" is a good plea to an action of debt on a judgment. So to debt for an escape, *Ib.* 270. Where money is levied on a *fi. fa.* but the writ is not returned, *nil debet* is a good plea; otherwise if it be returned, *Ib.* But if the sheriff may be sued in this form of action, he would thereby lose the opportunity of denying that there was any such record.

WICKHAM. Trespass *vi et armis* will lie against the sheriff, for a *tort* committed by the deputy, and yet the declaration states it as the act of the sheriff. The surprise is as great in that, as in this case, and yet no objection to the action on that account was ever thought of.

It is contended, that if *indebitatus assumpsit* will lie, the declaration ought to be special; but no case is cited in support of this doctrine.

In 1 *Bac. Ab.* 166, it is laid down, that if the sheriff levy money on a *fi. fa.* the plaintiff may have *indebitatus assumpsit* against him, for money had and received. It is clear that the author does not mean a *special indebitatus assumpsit*, or he would have expressed himself so; for when this sort of action is spoken of without any qualification, a *general action* is always intended. In an *indebitatus assumpsit* for work and labor, the kind of work need not be mentioned *Comb.* 430.

The case of *Ackworth vs Kempe* 1 *Dougl.* 40 though not exactly in point, runs parrallel with this in principle. The principle I contend for is, that the sheriff is not only liable for the acts of the deputy, but that they are in the view of the law, *the acts of the sheriff*. So too, in the case of *Saunderson vs Baker &c.* 3 *Wils.* 309, the deputy committed the trespass, and yet the action was against the sheriff, not for a *tort* done by the deputy, but by *the sheriff himself*. In the case of *Woodgate vs Knatchbull* 2 *Term. Rep.* 148, the action was brought upon a penal statute against the sheriff, for taking higher fees than the law permitted; the receipt was given by the deputy, and it was objected that the sheriff was not liable, though the deputy might be; but it was otherwise determined, and upon the principle that the
act

act of the bailiff was the act of the sheriff. In *Cowp. Rep.* 403, it is laid down, that the deputy is unknown to the plaintiff, and that the action can only be brought against the principal.

LYONS, J.—The great objection is, that the action is founded on a record, which is not stated in the declaration; can any case be produced where a judgment upon such a declaration has been sustained?

CAMPBELL. Wherever *indebitatus assumpsit* is brought, even upon a foreign judgment, the judgment is set forth in the declaration. *Crawford vs Whittall*, *Doug.* 4, n.

WICKHAM. I contend that a general *indebitatus assumpsit* is always in the same form. The case cited by Mr. Campbell, is not of an action for money had and received: the judgment is no evidence of money received to the use of the plaintiff.

I admit that if a record be the ground of the action, it must be declared upon; but it is otherwise if it be but inducement. In this case, the receipt of the money forms the *gist* of the action, and that is a thing in *pais*.

CAMPBELL. If the cause of the action grows out of a record, it must be stated; if it be necessary to state it, it cannot be avoided by changing the form of action: *Esp.* 233. Action of debt lies against the sheriff, if he return that he has levied the money, for it is matter of record, *Palm.* 148. If the money be levied upon a *fi. fa.* and the writ be returned, the sheriff cannot plead *nil debit*, for the return is matter of record, and not of fact. *Esp.* 270; the return itself, is sufficient to charge the sheriff, without other evidence. These cases shew, that the return, which is a matter of record, forms the *gist* of the action, and that the receipt is but inducement.

Indebitatus assumpsit is not always general; the declaration not only does, but in many cases ought to contain a specification of the charge. The case of *Crawford* and *Whittall* proves this; and if it were necessary to be special in an action founded on a foreign judgment, the argument is a *fortiori*, in the case of a judgment rendered in our own courts.

WICKHAM. The plaintiff might have recovered in this action, merely upon proving the receipt of the money by virtue of the execution, though the writ had not been returned; and if so, it follows necessarily that the receipt is the ground of the action.

The case from *Espin.* 270 only shews, that if the plaintiff in his declaration sets forth the return of the execution, the sheriff is stopped to deny the receipt acknowledged on record; but it does not prove that the return must be set forth.

I admit that declarations of *indebitatus assumpsit* generally, are as various in their forms as declarations in debt; but *indebitatus assumpsit* for money had and received, admits but of one form. The case of *Crawford* and *Whittall* was not an *indebitatus assumpsit* for money had and received; such an action would have been improper, as the judgment was not evidence of money received by the defendant.

ROANE, J.—The declaration in this action, containing a general count for money had and received, seems at first view to be a novelty, when used in a case like the present. On an examination and search into precedents, none have been found, which can warrant so general a declaration as this, in an action against a sheriff for money levied by his deputy upon an execution.

There is no doubt, but that the receipt of the deputy is sufficient to charge the sheriff, and that it is to be considered in law, as if the money had been actually received by the sheriff; but the question with me is, whether a *general count for money had and received* is a proper form of action in which to try the point, or whether the declaration should not have set out the particular grounds of the *assumpsit*? Such a specification would not vary the action; it would still remain an action of *indebitatus assumpsit* founded upon a general implied promise, though the particular grounds on which such promise arose, would be set out, and a recovery in that case might be pleaded in bar of an action of debt for the same cause. Such a specification, would not convert the action into an *assumpsit* upon a special undertaking. Thus, in the case of *Crawford* and *Whittall*, the action was *indebitatus assumpsit* upon an implied promise, and yet a foreign judgment was set out as the ground of the promise; many instances similar to this might be mentioned, if it were necessary. The utmost that the books say upon this subject is, that *indebitatus assumpsit* will lie against a sheriff, for money levied on a *fi fa*.

Until *Slade's* case, a notion prevailed, that on a simple contract for a sum certain, an action of *assumpsit* would not lie, and the decision in the above case, goes to a denial of that opinion; but this does not bind us to sustain a general count for money had and received, in a case like the present, of which I find no precedent.

Great encomiums have been passed upon the action for money had and received, by able judges; but I am satisfied, that the generality of the count in that action may often tend to surprise a defendant; I shall therefore not incline to extend it, beyond the limits within which it is now confined.

If the sheriff in this case, had been sued for the same cause in an action of debt, the return and proceedings must have been set out: if an action had been brought upon his bond of office, the particular charges would have been specified in the assignment of breaches: if a motion had been made against him for the money, the notice must have particularized the charge. Why then shall we not restrain the plaintiff to a mode of declaring, which is always in his power, which is equally as favorable to him, and more so to the defendant than the present, and is analogous (as it respects notice of the ground of complaint) to the above mentioned modes of proceeding?

However constant a man in his private character is supposed to be of his own transactions, and of those of his agents, it appears to me reasonable, that a *public officer* should have notice, when he is charged in his official character, of the nature of that charge. In this country, the deputy sheriffs are competent to most of the duties of the office, without the co-operation, or sanction of their principles. It is therefore highly reasonable, that the sheriff should be previously notified of the particular acts of his deputy, for which he is to be made responsible.

Being of opinion, that this court has the power, (which has been heretofore beneficially exercised by courts of law) to mould and fashion declarations and pleadings, so as to answer more effectually the ends for which they were invented, and there being no series of decisions (if a single one) sustaining a general count in cases like the present, I must say, that I think this declaration insufficient upon the evidence exhibited in the cause, and appearing in the record; that the judgment of the District Court, reversing that of the County Court on account of the generality of the declaration, is right, and as far as it goes should be affirmed. But a new trial ought to have been awarded, with liberty to the plaintiff to give such testimony as might correspond with, and support the declaration. The judgment of the District Court ought therefore to be reversed and remanded, with a direction to award a new trial, with such directions as above-mentioned, and not to allow the evidence which was excepted to, to go to the jury.

FLEMING, J.—There is no doubt, but that *indebitatus assumpsit* will lie against the high sheriff in a case like the present, and if the particular grounds of the charge had been specified in this declaration, it would in my opinion have been unobjectionable.

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The action on the case for money had and received is a beneficial remedy, and may be rendered more so by restraining it within proper limits. But it would defeat the great object of pleading, if we were to countenance this action in the latitude contended for. The case should be truly and fairly stated, that the defendant may not be surprised at the trial by a want of notice of the real cause of action, and also, that he may be enabled to plead the judgment in that action, in bar of any other suit, which might be brought against him for the same cause.

The defendant is the executor of the sheriff, and is called upon to answer for the acts of the deputy; how is it possible that he could from this declaration acquire information respecting a transaction, to which we must suppose him so entirely a stranger? If the case had been properly stated, he might have defended himself by shewing there was no such record. If the sheriff be obliged to answer for the misconduct of his deputy, he ought to be enabled to recover over against the deputy, and to shew *upon the record*, on what account the judgment against him had been rendered; this could not have been done in the present case.

That *indebitatus assumpsit* will lie against the sheriff, for money received by his deputy upon an execution, is not denied; but the declaration may properly contain a specification of the charge, and in my opinion ought to do so. The case of *Woodford vs Deacon*, Cro. Ja. 206, is not so strong as this, and yet judgment was reversed on account of the generality of the declaration. Upon the whole, I concur with the judge who has preceded me, in the judgment which this court ought to render.

LYONS, J.—That this is a beneficial action to both parties, seems to be agreed by every one. It is also agreed, that an action of *indebitatus assumpsit* will lie against a sheriff, to recover money received upon an execution by his deputy. But unless the form of the action in such a case be laid under certain restrictions, it would very illy merit the encomiums which have been passed upon it.

The great object of pleading, is to apprize the contending parties of the real subject of dispute; without it, they may be entrapped at the trial, and real injustice may be produced.

I can find no precedent in England, or in this country, to warrant so general a declaration as the present. It is true, that the reported cases do not furnish us with the forms of the pleadings, but it is to be inferred from them, that the declarations
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in cases of this sort were special. In the case of *Woodford v. Deacon, Cro. Jac.* 206, it appears, that the practice had been to declare generally; but the court in that case corrected it, assigning as a reason, that the declaration did not shew for what cause the action grew due.

Being unshackled by precedents, I consider the court as at perfect liberty to modify this action, so as to promote the great object of pleading. I do not say that the declaration should contain a special state of the case; but the defendant should have been apprized that he was sued for money received in his *official capacity*.

The following opinion was entered viz: "This court being
" of opinion, that in all actions against sheriffs for money had and
" received by them, by virtue of their office, the nature of the
" debt or demand should be so far stated in the declaration, as to
" distinguish them from private debts and contracts, in order to
" prevent surprise, by giving notice to the defendants of the
" causes of action, that they may be ready to answer the same,
" and the plaintiffs not having stated in the declaration filed
" in this suit, that the money had and received by the defendant's testator was so received by him by virtue of any execution or of his office of sheriff, there is error in the judgment
" of the County Court, in the court's allowing the copies of
" the records in the proceedings mentioned to go as evidence to
" the jury; and that there is no error in the judgment of the
" District Court reversing the judgment of the said County
" Court on that account, but that there is error in the judgment
" of the said District Court, in not setting aside the verdict in
" the said County Court, and awarding a new trial in the said
" cause, with directions not to permit the copies aforesaid to go
" as evidence to the jury, therefore" &c.

Both judgments reversed and a new trial awarded &c.

RUFFIN,

RUFFIN,

against

CALL.

THIS was an action of debt brought by the appellee, as surviving obligee of Alexander Morris and others, late justices of the County Court of *Prince George*, for the benefit of *Nicholas Garrat* and *Sarah* his wife, upon a guardian's bond. The defendant not appearing, an office judgment was entered against him and the sheriff, and a writ of inquiry was executed and damages assessed. The cause came before this court by a writ of *supersedeas* awarded upon the petition of the defendant *Ruffin*.

ROANE, J.—In the argument of this cause, many points were made at the bar; But it will be unnecessary to decide any but this; namely, whether the judgment was legally rendered against the *sheriff* for his not taking appearance bail upon service of the writ.

As a preliminary to my opinion upon this point, I will give my present impressions upon another, which is somewhat connected with it, and which was also mentioned in the argument. It is, whether in a case like the present, of a judgment by default for want of an appearance in an action of debt upon a bond with a collateral condition, an enquiry of damages must necessarily take place?

There is no doubt, but that the 21 sect. of the act “for limitations of actions; for preventing frivolous and vexatious suits; concerning Jeofails, and certain proceedings in civil cases,” Ch. 76, was meant to extend an enquiry of damages to all cases of interlocutory judgments, in actions of debt on such bonds. The English statute of 8 and 9 *Will. 3, C. 11*, is substantially like our act, as to the present point; and it is laid down in the case of *Goodwin vs Crowle* executor, *Coup. Rep.* 359, that according to the true construction of that statute, the penalty is not to be levied in any case whatever.

But our act, following that statute too implicitly, has omitted to direct an enquiry of damages to be executed, in case of a judgment by default for want of an appearance; and it would be a subject of much regret, if this inattention should defeat the design of the legislature, which was, that the penalty should not be levied for the first breach, but should remain as a security, until it should be exhausted. But fortunately for the object of
this

this beneficial law, the 42 section of the District Court law, which is in *pari materia* with the other, has cured the omission; it declares, "that all judgments by default for want of an appearance, &c. obtained in the office, and not set aside on some day of the next succeeding District Court, shall be final in actions of debt founded on any specialty, bill or note in writing, ascertaining the demand, unless the plaintiff shall choose in any such case to have a writ of enquiry of damages, and in all other cases, the damages shall be ascertained by a jury, to be empanelled & sworn to enquire thereof." Now, if the words, *ascertaining the demand*, be not referred to the word *specialty*, the judgment for the penalty of a bond with a collateral condition, would be final, and the intention of the above law would be frustrated, in case of a judgment by default for want of an appearance; whereas, by such a reference, the judgment is final only, when the specialty is for payment of money or tobacco, and bonds with a collateral condition, will fall under the latter description of the clause, whereby the intention of the law will be answered, by awarding an enquiry of damages.

The above clause in point of expression, seems nearly analogous to the 26th section of the same laws which provides, "that in all actions of debt, founded on any writing obligatory, bill, or note in writing for the payment of money or tobacco &c. the sheriff shall return on the writ, the name of the bail by him taken, and a copy of the bail bond," &c. Are the words, *for payment of money or tobacco* here, to be referred to the words *writing obligatory*, so as to produce a construction which would dispense with the return of a bail bond in actions of debt on a writing obligatory with a collateral condition? I have just shewn that analogous words in another clause must be understood according to such reference; in both cases, the grammatical construction of the sentence seems to warrant it; and the sentence in question may well be understood, as having the same meaning, as if the word *or*, had intervened, between the words *obligation*, and *bill*.

As the true meaning of the 21st section of the act first mentioned is, that the penalty should not be levied, but should merely stand as a security for such damages as might be recovered, (which may often be very small when the penalty is very large) perhaps the legislature did not act unreasonably, in restricting appearance bail to cases of bonds for payment of money or tobacco. Be this as it may, neither the words, nor the just interpretation of this section seems to require appearance bail to be returned,

turned, in actions of debt on bonds with collateral conditions; and if so, the judgment in the present case against the sheriff is erroneous; but as it has been decided in this court, and partly in the case of *White* and *Johnsen*, that a judgment against a defendant and sheriff, which as to the latter is erroneous, must be reversed *in toto*, all the proceedings in this case subsequent to the declaration, must I think be set aside, and the cause remanded.

* The opinion of THE COURT, was as follows, viz:
 "The court is of opinion, that appearance bail is not required
 "by law, in actions of debt on bonds with collateral conditions,
 "and not for the payment of tobacco or money only; and the action
 "on in this cause, being founded on a bond given by a guardian
 "to the justices of the County Court of *Prince-George*, with a
 "collateral condition as set forth in the declaration, judgment
 "ought not to have been entered at the rules in the clerk's office,
 "against the sheriff, for the non-appearance of the plaintiff
 "to the said suit, and that the said judgment not having been
 "set aside as to the said sheriff before the writ of enquiry in the
 "proceedings mentioned was executed, and final judgment rendered
 "thereon against the plaintiff, the judgment of the said
 "District Court is erroneous."

Judgment reversed with costs, the verdict set aside, and all the proceedings subsequent to the declaration, and the cause to be proceeded in anew on the sheriff's return on the writ, against the plaintiff only.

RUFFIN,

* Note. The reporter was not in court this term, when the opinions were delivered in the cases of *Ruffin vs Call*, *Winston's executor vs Francisco*, *Pearpoint vs Henry*, *Burwell vs Anderson*, and *Walker vs Walke*, but was favored by Judge Roane, with the notes of the opinions delivered by himself in those cases.

R U F F I N,

*against*PENDLETON & COURTNEY, executors of
H A R W O O D.

THIS was an action of debt brought by the appellant in the District Court of *King and Queen*, upon a judgment recovered by motion against the appellees, as executors of William Harwood. The declaration states the judgment and award of execution thereupon, with the return, "that no effects of the testator were to be found in the hands of the defendant." The declaration avers, "that after the rendition of the said judgment, divers goods and chattels which were of the said testator at the time of his death, of value sufficient to satisfy the said judgment, came to the hands of the defendants to be administered, which goods and chattels, the defendants wasted &c. by which an action accrued" &c.

Plea, "that the plaintiff his action aforesaid ought not to have or maintain against the defendants, because they say, that at the time the said judgment given against them by the said District Court, no goods and chattels which were of the said testator at the time of his death were in the hands of the defendants to be administered, nor have any goods or chattels of the said testator at any time afterwards come to their hands to be administered, except only goods and chattels to the value of £ and which are not sufficient to satisfy the several judgments herein after mentioned, and which are bound and liable to the execution of the said judgment," [here follows a specification of the judgments] "which said judgments are still in full force, and in no manner reversed or annulled; and the defendants further say, that they have not wasted, elained, converted or disposed of any of the goods and chattels which were of the testator at the time of his death to their own proper use, in manner and form" &c. To this plea the plaintiff replied generally and issue was joined.

At the trial, the plaintiff objected to the defendant's giving any evidence to the jury in support of the issue joined, tending to prove any part of the plea, which might have been properly pleaded to the exoneration of the defendants upon the original motion,

motion, whereon the judgment mentioned in the declaration was obtained, the plaintiff having given in evidence the judgment, execution and return thereon. But the court being of opinion, that the former judgment obtained against the defendants, not being according to the course of the common law, they had been thereby precluded from defending themselves, as otherwise they might have done; over-ruled the motion, and permitted the defendants to give evidence in support of every part of their plea; whereupon the plaintiff tendered a bill of exceptions which was sealed and made part of the record.

Verdict and Judgment for the defendants, from which the plaintiff appealed to this court.

MARSHALL for the appellant. It is most clear, that nothing can be pleaded in bar of an action of debt, or of a *scire facias* upon a judgment, which might have been pleaded to the original action. A full administration, or subsisting debts of superior dignity might have been properly used as a defence in the original action, but were inadmissible in the present suit. The judgment obtained upon the motion, amounted to a confession of assets, and estopped the defendant from afterwards denying that he had a sufficiency to satisfy this judgment. The reason assigned by the court for over-ruling the motion was certainly not a sound one; for the appellee might have given evidence to prove a deficiency of assets, as well upon a motion, as in a regular common law action.

CAMPBELL for the appellee. The plea of "fully administered" does not go to bar the plaintiff's claim, but to protect the executor; and therefore, the rule mentioned by Mr. Marshall does not apply. But if I should admit the plea to have been bad, still this will not impeach the opinion of the court; for if the plaintiff, instead of demurring, take issue on the plea, the defendant ought not to be prevented from proving the truth of it.

MARSHALL. If the plea be immaterial the court will award a repleader; this is always done when the plea, if true, offers no bar to the action; and if I am right in this, the judgment must be reversed. We are then brought back to the validity of the plea. If the appellee had fully administered the assets, the appellant could not have had a judgment, unless he were contented to take one when assets might come. But if a judgment be obtained against the executor, he can only defend himself against an action founded upon that judgment, by some matter *posterior to the judgment*.

CAMPBELL. The first judgment does not burthen the executor with the payment out of his own estate, unless he put in a *false plea*. Upon the pleas of payment, and fully administered, the verdict may be against the plaintiff upon the second, and in his favor upon the first plea.

This case is much stronger for the executor, on account of the first judgment having been rendered upon motion; these summary remedies are not to be favored, because they are contrary to the course of the common law. The executor had a right to a trial by jury upon his plea of fully administered, and though *the existence of the debt* might have been established by the first judgment, it was still right, that this collateral question should have been decided by the jury. It is impossible that any precedents should be found to govern this case, and therefore the court will so construe the law which sanctions this summary mode of proceeding, as to preserve the trial by jury where it is not expressly taken away.

MARSHALL. The amount of Mr. *Campbell's* argument is, that there is no difference between a general judgment against the executor, and one which is to depend upon assets afterwards coming to his hands. But it is clear law, that in the former case, the sheriff may return a *devastavit* if he please, because the executor is estopped to deny assets; the *scire fieri* inquiry is only for his safety. It is certain, that judgment rendered upon confession, or by default, is an admission of assets; so if it be rendered upon the plea of *non est factum*, or upon the plea of payment. *Salk. 310—1 Atk. 292.* And there is no difference between those cases, and the present, for the estoppel is produced by the defendant's not pleading fully administered to the first action.

CAMPBELL. The case from *Atk.* is not supported by the authorities which are there cited. *Roll. Ab.* title *executors* is referred to in *2 Bac. 436*, and the law there stated is, that the executor is no farther chargeable than as he has assets, unless he make himself liable by a *false plea*, or by suffering judgment to pass against him by default. If the not pleading fully administered will subject him to the payment of the debt out of his own estate, why do the books all lay it down, that he makes himself liable by a *false plea*? Judgment by confession, or by default is stated to be an admission of assets in *1 Esp. 295.*—In *Hob. 178*, it is laid down, that a confession of judgment is not an admission of assets, and yet there is no plea of fully administered in that case. But none of the cases prove, that assets are confessed,

confessed, by *the failing to plead fully administered*. If the doctrine contended for by Mr. Marshall be correct, what reason can be assigned for the judgment being entered *de bonis testatoris*?

THE COURT delivered the following opinion: "That the appellant having in his declaration filed in this suit, only suggested a devastavit of assets which accrued *after the judgment obtained by him* against the appellees as executors of *William Harwood* in the District Court of *King and Queen*; as stated in the said declaration, the appellees were not estopped from pleading a special *plene administravit* in bar of the appellant's action, nor precluded from proving the same by the evidence stated in the record as offered by them on the trial of the issue in support of their plea, and that there is no error in the opinion of the District Court permitting that evidence to go to the jury."

Judgment affirmed.

WINSTON'S Executor,

against

FRANCISCO.

THIS was an action on the case brought by the appellant in the County Court of *Buckingham*. The declaration states, "that the defendant in the year 1783, was indebted to the testator of the plaintiff in the sum of £ 50, for a riding chair and clock, and being so indebted, the defendant left in the hands of the testator, a bond given by *Abraham Sandesher* to *Richard Fretwell* for £ 50, and gave directions to the testator to collect the money when it should become due on the said bond, and apply it to the payment of the said debt due from the defendant, and if the money mentioned in the said bond could not be collected, or the same prove bad, that he the defendant would make it good, or pay to the testator the said sum of £ 50, whenever afterwards required," and avers, "that the said bond was given for a gaming consideration, and that the obligor hath refused to pay, of which defendant had notice, who notwithstanding promising the said money to the plaintiff to pay in right of his testator, when required, he hath not paid, though thereto oftentimes

oftentimes required, to the damage of the plaintiff as executor of the said *£300*.

Upon the plea of *non assumpsit*, the jury found a verdict for the appellant.

A motion was made in arrest of judgment for the following causes,

1. That there was no assignment of the bond by *Fretwell* to *Francisco*, nor by *Francisco* to the testator.

2. That it did not appear in evidence that suit had been ever brought on the bond, or at what time application for payment had been made.

3. That the declaration is uncertain, illegal and informal.

The Court determined the errors to be sufficient, and arrested the judgment, from which the plaintiff in the County Court appealed to the District Court of *Prince Edward*, where the judgment was affirmed, "because it appeared to the court, that there was no assumpsit laid in the declaration."

From this judgment of affirmance, an appeal was granted to this court.

ROANE, J.—Altho' an assumpsit is the very *gist* of this action, yet I would always incline to sustain a declaration where one is laid, however irregular the expressions to that effect may be, especially after a verdict. But it must be positively charged, otherwise the declaration does not set out a sufficient cause of action, to entitle the plaintiff to recover.

In this declaration it is nowhere averred, that the defendant promised to pay the money, and in this respect, it is no way distinguishable from the case of *Lee vs Welch*, 2 *Str.* 793. In that case, the declaration ran thus, "that the defendant being indebted to the plaintiff for goods sold and delivered, would well and truly content and pay" leaving out the words *and in consideration thereof assumed upon himself and then and there promised* &c. After judgment by default, it was arrested, *there being no promise actually laid*.

In the present case there is a verdict, and the question is, whether this will cure the defect in the declaration? In the case of *Avery vs Hoole*, *Cowp. Rep.* 825, it is said, that altho' a verdict will cure ambiguity, it will not aid where the gist of the action is not laid in the declaration. And the rule laid down by the English judges, *that a verdict will supply whatever must of necessity have been proved to the jury*, is supposed not to extend to cases where the gist of the action is omitted.

So

So too, that clause in our act of *Jeofails* which declares, "that a verdict shall cure the omission of the averment of any matter, without proving which, the jury ought not to have given such a verdict," cannot be construed to cure the want of an averment of the *cause of action*, for in such a case, no judgment can be given.

But it was contended, that the following words in the latter part of the declaration, "who notwithstanding promising to pay said money &c." amount to an averment of a promise; but the promise ought to be *directly* averred, and not by way of inference. I think the judgment ought to be affirmed.

THE COURT affirmed the judgment of the District Court,

D O W N M A N,

against

CHINN, Executor of DOWNMAN.

ON the 3d of October 1791, a writ of *fi. fa.* was sued out by the defendant in error against the plaintiff, upon a judgment of the District Court of *Northumberland*.

The sheriff took a forthcoming bond payable to *himself*, with condition to deliver the property to the sheriff *when demanded*; but the amount of the execution was not recited.

It appears from the record, that on the 4th of January 1793, a second execution issued upon the original judgment, by which part of the money was made, but this execution is not spread upon the record by a bill of exceptions, nor does it appear to have been noticed by the court. Upon the motion of the defendant in error, the forthcoming bond above stated was quashed, as being informal. The order of the court was entered as follows viz: on the motion of *John Chinn &c.* executors of *Rawleigh Downman* deceased, against *Rawleigh Downman*, on a bond taken on an execution sued out of this court by the said executors, against the said *Rawleigh Downman*, it is ordered, that the bond taken on an execution sued out of this court by the said executors against *Rawleigh Downman* to *Richard Beale* sheriff of *Richmond* county for the forthcoming of property taken on the said execution, be quashed, it appearing to the court that the same is insufficient."

To

To this order a superſedeas was awarded by one of the judges of this court.

CAMPBELL for the plaintiff in error, contended, that the court had no right to quaſh a forthcoming bond, although it ſhould be informally taken; that it was to have the force of a judgment; and was as completely out of the reach of the *ſame court* to which it was returned, as the judgment of a preceeding term would have been. But that if the court might properly exerciſe this power, the ſecond execution ought alſo to have been quaſhed, ſince it improvidently iſſued upon the original judgment, after a forthcoming bond had been taken and returned; and to prove this he relied upon the caſe of *Taylor vs Dundas* decided in this court, (ſee *ante* vol. 1, p. 92.)

WASHINGTON for the defendant, contended, that the bond being clearly defective, could no otherwiſe be got rid of, ſo as to authoriſe the plaintiff to proceed to obtain the effect of his original judgment, than by a motion to quaſh it: That in the caſe of *Hendricks and Taylor vs Dundas* (*ante* p. 50) this court had affirmed the judgment of the county court, quaſhing a forthcoming bond.

As to the ſecond execution, that was merely a miniſterial act, and could only have been quaſhed by the court from whence it iſſued, upon a motion regularly made for that purpoſe, and if upon that motion the court had given an erroneous opinion, it might properly have been corrected upon an appeal to this court.

But upon this appeal, the court is confined to the judgment of the Diſtrict Court upon the motion which was made, and cannot notice the ſecond execution which is regularly no part of the record. This point was ſettled in the caſe *Leſtwich and Stovat* (*ante* vol. 1, p. 303.) In the caſe of *Taylor vs Dundas*, a ſecond execution iſſued without a previous motion having been made to quaſh the forthcoming bond, and the motion which produced the judgment in that caſe, was to *quaſh the ſecond execution*.

ROANE, J.—There is no doubt, but that this bond is faulty in the following inſtances at leaſt, 1ſt, that it is made payable, not to the creditor, but to the ſheriff. 2dly, the amount of the execution is not recited in it; and 3dly, the condition is to deliver the property, not at the time and place of ſale, as it ſhould have been, but *when demanded*. But it is objected that the court had no power over the bond, ſo as to quaſh it, though ever ſo faulty. The caſes which were cited by the counſel for the defendant in error, and another alſo decided in this court of

Hubbard

Hubbard and Taylor (*ante* vol. 1, p. 259) furnish a complete answer to this objection.

The order of the District Court though right upon the main points, is rather too general, in not specifying the bond more particularly by its date, amount &c. however, as it is spread upon the record, we must suppose, that it was that bond to which the motion and order related.

As to the second execution, there is no doubt, but that the court ought to have quashed it, if a motion for that purpose had been made. But it does not appear that the court were informed of its existence, and therefore we cannot say that they erred.

CARRINGTON, J.—Concurred in the same opinion.

LYONS, J.—It seems to have been admitted by the counsel for the plaintiff, that this bond was faulty, but the power of the court to quash it is denied. It would certainly be highly inconvenient, if ministerial acts like the present were without the controul of that court to which the officer belongs, and if the only remedy for the party aggrieved by his mistakes, were an action against the officer. I hold the law to be otherwise, and that the court may properly correct the ministerial acts of its own officers.

The proceedings in this case have certainly been very irregular; the court ought to have quashed the second execution, if an application for that purpose had been made, because the forthcoming bond whilst in force, was a satisfaction of the first judgment. The general course is to quash the execution, as well as the bond; but as no motion for this purpose was made, we cannot condemn the order which was made.

Order affirmed.

D A L B Y,

against

P R I C E.

THE appellant, against whom a decree had been entered in the High Court of Chancery, filed a bill of review stating new matter. The appellee answered, and a general replication

cation was entered and commissions awarded; in less than a month after these proceedings, the cause was set down, heard, and a decree entered; from which *Dalbly* appealed.

The following, was the opinion and decree of this COURT,
 " Whenever a general commission issues for taking depositions,
 " upon an answer and replication filed in any suit depending in
 " the High Court of Chancery; six months from the time of
 " the replication should be allowed the parties for taking their
 " depositions, and that such cause ought not to be set for hear-
 " ing, nor heard and finally determined, without the con-
 " sent of the parties entered on record; before the expi-
 " ration of the said six months, according to the direction of
 " the act of Assembly concerning the High Court of Chancery;
 " and it appearing by the record, that the replication in this
 " suit was filed in the month of May 1795, and that
 " the cause; was without the consent of the parties so
 " entered on record; heard and finally determined on the
 " 2d of June following, the said decree is erroneous." There-
 " fore it is decreed and ordered, that the same be reversed and
 " annulled; and that the appellee pay to the appellant his costs
 " by him expended in the prosecution of his appeal aforesaid
 " here. And it is ordered, that the cause be remanded to the
 " said High Court of Chancery to be put on the rule docket and
 " proceeded in according to the foregoing opinion of this court,
 " allowing the parties six months including the time the cause
 " had remained at the rules after the replication, and before the
 " date of the decree aforesaid for taking their depositions; before
 " the same be again set for hearing."

PEARPOINT,

against

HENRY.

THIS was an action of trover and conversion brought in the District Court of *Monongalia*, by the appellee, for a negro woman. Upon the plea of not guilty, the jury found a verdict for the appellee. The appellant moved in arrest of judgment, and amongst other errors assigned the following viz.
 " that the price or value of the negro is not set forth in the declaration."

Judgment

Judgment for the appellee, from which an appeal was granted to this court.

WILLIAMS for the appellant. It is essential in an action of trover and conversion, that the price should be stated in the declaration, 5 *Bac.* 275. If so, it is not cured by the act of *Jeofails*. It is true, that a mistake in setting forth a sum of money, quantity of merchandize, &c. is cured, if the same be rightly stated in any part of the record; but this clause in the act of *Jeofails*, will not aid the total omission of price.

MARSHALL for the appellee. It is laid down in the case of *Wood vs Smith*, *Gro. Ja.* 129, by three judges against two, that at common law, it was not necessary to state the price in an action of trover and conversion, and the reason given seems to be a sound one, viz: that *damages* are demanded, and not *the thing itself*. But if this were not so, it is certainly mere matter of form, and therefore cured by the act of *Jeofails*. It does not appear that the case cited from 5 *Bac. Ab.* 275, was after verdict.

WILLIAMS in reply. Another reason why the value should be stated in this country is, that the court may see whether they can properly try the suit in that particular form of action, for if the value were below £6, the suit by the law of this state should be by *petition*.

ROANE, J.—It seems to be the better opinion, that a declaration in this action need not state the price of the thing converted, tho' this is necessary in the action of *detinue*, where the thing itself, or the value is to be recovered. In the former case, it is not the price, which the plaintiff goes for, but damages for the conversion: and even where the price is laid, he may recover more or less, provided the damages do not exceed those laid in the declaration.

THE COURT affirmed the judgment.

BURWELL,
against
 ANDERSON, & Co.

THE appellant obtained a superseas, to remove the record of the proceedings of the County Court of *Gloucester*, before the District Court of *Williamsburg*. The record contains a twelve months replevy bond, given by *Burwell* to *Anderson*; an affidavit of *Matthew Anderson*, agent for *Matthew Anderson & Co.* that the whole amount of the replevy bond was then due. It is then stated, "that a *fi. fa.* issued on the above bond, on the 12th of October 1793."

The errors stated in the petition for the superseas were, 1st, That it doth not appear in the bond, for what property of the said *Burwell* the same was entered into, as the law intended it should."

"2d, That the affidavit on which the execution issued upon the said replevy bond, was not made by the creditor, or by his assignee."

The District Court quashed the writ of superseas with costs, as having improvidently issued, from which judgment *Burwell* appealed.

ROANE, J.—It is unnecessary to consider the errors stated in the petition for the superseas, though at present, I do not think there is any weight in them. The only question is, whether the writ of superseas improvidently issued or not?

A superseas, is one mode pointed out by our law, by which the record of an Inferior Court, may be removed into a Superior Court, and the propriety of the judgment there examined. But there must be a *judgment* of the Inferior Court; this is apparent from a view of all the laws upon that subject, and particularly from that, which directs the Superior Court upon a reversal, to give such judgment as the Inferior Court ought to have given.

This case, was assimilated by the counsel for the appellant, to an award of execution upon a forthcoming bond, in which case, a superseas might properly issue. But in that case, there is a *judgment of the court*, or an award of execution *in nature of a judgment*. If the bond in question be faulty, the party might have moved the County Court to quash it, as well as the execution

cution issued upon it, and the opinion of the court upon such motion might, if erroneous, have been corrected by a Superior Court upon a superseatas; but in this case, there was no judgment to superseade.

THE COURT affirmed the judgment of the District Court.

SARAH WALKER & THOMAS WALKER, executrix & executor of THOMAS R. WALKER, deceased,
against

THOMAS WALKER.

THE appellee filed his bill in the County Court of *Princeps Anne*, stating, that the said *Thomas R. Walker* was appointed his guardian, and in the year 1776 was indebted to the plaintiff, £1512: 12: 0: $\frac{1}{2}$, as appeared by his guardianship accounts, settled and filed in the County Court. That in the year the said *Thomas R. Walker*, paid to *John Thoroughgood*, the subsequent guardian of the plaintiff, £854: 3: 3 in bonds, leaving a balance of £468: 8: 8 $\frac{1}{2}$ still due. The prayer of the bill is for payment of this balance with interest.

The answer states, that after the appointment of *Thoroughgood* as guardian to the plaintiff, he and the testator, *Thomas R. Walker*, settled the accounts of the latter, and stated a balance then due to the plaintiff, of £244: 12: 2. That they have understood, that in the year 1787, after the plaintiff came of age, he accepted a bond from the said testator for the above balance. They state a small payment since, and are ready to discharge the balance still due.

Amongst the exhibits filed in this cause, is a letter from *Thoroughgood*, to the testator, *Thomas R. Walker*, dated in June 1786, enclosing a blank bond, with a request, that the testator would settle the balance due to the ward, (the present plaintiff,) fill up the bond with the sum due, and return it executed. The writer also acknowledges in this letter, the receipt of £300, in January 1780, "which" he says "will, according to the scale of

of depreciation amount to £ 7: 10 specie, and being deducted from the balance now on the books of the said testator, will be the amount in which he is indebted." He also adds, "that the testator should not complain of hardship in the settlement, as a great part of the money paid by the testator, was received by him in paper money according to its nominal amount." In answer to this letter, (also dated in June 1786) the testator promises to prepare for the settlement, and adds, "that he shall say no more about hardships, being fully satisfied that all debts should be settled."

The bond was accordingly filled up with the sum of £244, and returned: it was afterwards accepted by the plaintiff without objection, except, that by letter, he required a bond from the testator for the amount of the interest on the £244, from a date anterior to the principal bond; this bond for interest was not given.

The cause coming on to be heard, on the bill, answer, replication and exhibits, an account was directed. The commissioners report a balance of £ 784: 4 due the plaintiff, with interest. In this account they reduce the £ 300 by the scale of January 1780; they also make a special report, stating the bond above mentioned, amongst other exhibits, but give it as their opinion, that the plaintiff was not bound by the settlement, nor by his letter to the testator, since the terms of it were not accepted.

The report not being excepted to, a decree was made confirming it, from which the defendants appealed.

The High Court of Chancery directed an account to be settled, before one of the masters of that court.

To the report made by the master, exceptions were filed, and amongst others, the following; viz; that the settlement with *Thoroughgood* ought to be established; and if not, the payments in paper money ought to be credited at their nominal amount, and not according to the scale.

The exceptions being over-ruled, the decree of the County Court was affirmed, and an appeal was prayed to this court.

MARSHALL for the appellant. The settlement between the first and second guardian was binding upon the ward, unless unfairness or collusion between them in making it, had been charged, and proved. But if I am incorrect in this, I contend, that the payments made to the second guardian in paper money, ought not to have been scaled. The act of 1781, Ch. 22, is too clear upon this subject to be misunderstood; it declares, that all payments,

payments, either to the full amount, or in part discharge of any debt, are to be credited at their nominal amount. Nothing I conceive, but the agreement of parties could vary this rule.

It is true, that in this case, the payments were scaled by the settlement, but this was part of the settlement, and if the settlement be annulled, the agreement to scale has equally lost its obligation upon the parties; for surely, the court will not set aside the former, and bind the parties by the latter, when both constitute one entire act.

CAMPBELL for the appellee. This is the common case of a ward calling upon his guardian for an account. The guardian attempts to avoid it, by insisting upon a settlement made with the former guardian; a fact not responsive to the bill, and therefore not to be noticed, further, than as he could prove it to be correct and fair. That it was either, in this case, cannot be contended.

As to the payments made by the guardian, they ought to be scaled. That clause of the act of 1781 Ch. 22, which declares, that payments made of any sum, either to the full amount, or in part payment of any debt, should be credited at the nominal amount, was never considered as being applicable to cases of running accounts.

WICKHAM on the same side. I consider it as an important question, whether the exception to the master's report, can avail the appellant, as it was not *originally taken to the report made in the County Court*.

I doubt very much the power of the High Court of Chancery, acting as an *appellate court*, to direct an account. The decree such as it appeared upon the record, should have been affirmed, or reversed and remanded; and if so, the former must have taken place, since the report on which the decree sought to be reversed, was founded, was not excepted to. As well might this court direct an account, and upon the report, make a decree corresponding with it, but this was never yet attempted. The reference in this case was only for the purpose of calculation, and was not intended to open the decree.

As to the merits, I lay it down, that nothing can discharge the guardian from accounting, but a settlement with *the ward*, after his attaining full age. *Payments* to the second guardian, would I admit, be valid, but a *settlement* would not. Great inconvenience might result from a contrary doctrine; the second guardian might with the best intentions be imposed upon; and yet he might repel the claim of the ward, by saying, he was a trustee, and acted

ed with good faith, and therefore should not be charged; and the first guardian would defend himself by the settlement.

But in this case, no settlement appears. One guardian demands it of the other, and calls for a bond for the balance: a bond is given, but no settlement is made.

The consent of the appellant to be accountable by the scale, forms no part of the settlement, but is antecedent to it.

The act of 1781 with respect to partial payments, is never applied to items in unliquidated, running accounts, and so it has been often settled in this court. But certainly it can never apply in the case of a trustee.

MARSHALL in reply. There is no doubt, but that the Chancellor may, upon an appeal, open the decree, and if necessary, direct a new settlement of the accounts; he is in the constant practice of doing so, and I have never before known it questioned.

In *Humbrey and Smith*, this court reversed the Chancellor's decree, because a calculation had not been made by the master, which any person might have made in one minute.

But be this as it may; if the error appear in the decree of the County Court, or is *apparent upon the face of the account*, it will be sufficient to reverse the decree of the High Court of Chancery, although no exception was specially taken; for an exception is not necessary, where the error appears, either upon the face of the account, or in a special report. The use of an exception is, to bring into view such objections to the report, as do not appear upon the face of it.

In this case, the commissioners have stated specially, the ground upon which the account is settled, and the court are at liberty to say, if they decided right or not.

But it is contended, that no settlement was made; we see a letter respecting a settlement, with an admission of the sum then due, an account, and a bond for the balance, in the possession, first of the guardian, and then of the ward. Suppose that the ward was not originally bound by the settlement; he is certainly concluded by his subsequent consent to, and ratification of it.

This consent is proved by his having possession of the bond after his arrival at age, and his letter to the testator, demanding a bond for the interest due on the £ 244.

It is then said, that in cases of this sort, we are not entitled to a credit for payments at their nominal amount, and that the point has been so decided in this court. If such have been the decisions, I am a stranger to them.

The

The testator ceased to be guardian before depreciation began; *Thoroughgood* succeeded him in that office, which completely closed the accounts of the former; the balance then due, whether liquidated or not, was a debt to be paid; no further items could be introduced into it but payments, and these, when made, were like all other payments.

It is objected, that *Walker* was a trustee; so he was until he ceased to be a guardian; but whether he was or was not, it has been determined in this court, in the case of *Sallee* and *Yates*, and *Granberry* and *Granberry*, that payments made by an executor to the estate he represented, and entered on his books, should be credited at their nominal amount.

We are then brought to consider, whether this right to a credit at the nominal amount has been abandoned. It is not true as was contended, that the consent of the testator to scale, preceded the settlement; but if it were, the principle of the settlement is thereby established, and if the settlement be set aside, it would be monstrous to bind the testator by his concessions in that letter, which were made in order to produce the settlement.

ROANE, J.—Upon the appointment of *Thoroughgood*, in 1776, as guardian of the appellee, the character of the appellant's testator as guardian ceased, and with it, his liability to pay and receive monies generally, on account of his ward. Consequently, any payment by him thereafter, to the succeeding guardian, should be considered as a payment on account of a debt admitted to be due. And the receipt for £300, given by *Thoroughgood*, in January 1780, which uses the terms "£300 in part of your account with *T. Walke*" strongly imports, that that money was received in part of a debt, due from the testator to the appellee as his former guardian; of course, that payment, must, according to the second section of the act of Assembly, directing the mode of adjusting and settling certain debts and contracts, and agreeably to prior decisions by this court, be credited at its nominal amount.

If the letter of the appellant's testator of June 1786, can be construed into an admission, that the payment of the £300 should be subjected to the scale of depreciation, it was made in consequence of an offer of *Thoroughgood*, in his letter of the same date, to accept a settlement made by the said testator from his books, according to the tenor of that letter; and the appellee, by bringing this suit, having departed from the settlement so made, or expected

pected to be made by the testator, the admission, if it can be considered in that light, (for the expressions are extremely vague and indefinite as to that,) is no longer binding upon the representatives of the testator.

I am therefore of opinion, that the decree is erroneous in not allowing the credit for the £300, at its nominal amount.

THE COURT gave the following opinion and decree viz:
 “ By the appointment of *John Thoroughgood* to the guardianship
 “ of the appellee, the guardianship of the appellant’s testator, as
 “ also his habit of receiving and disbursing monies generally,
 “ on account of the appellee, having ceased, the receipt thereafter
 “ of any money by the said *John Thoroughgood*, from the said
 “ preceding guardian, should be considered as a payment on account
 “ of a debt, admitted to be due from him as guardian aforesaid;
 “ that by authority of the act of the General Assembly passed in 1781,
 “ entitled “ an act directing the mode of adjusting and settling the
 “ payment of certain debts and contracts, and for other purposes”
 “ and in conformity to former decisions by this court, the payment
 “ of £300, made the 3d of January 1780, by the appellant’s testator
 “ to the subsequent guardian, was not subject to the operation of the
 “ scale of depreciation: That there is error in the decree of the High
 “ Court of Chancery, permitting that payment to stand reduced;
 “ and that there is no error in the residue of the said decree, therefore
 “ &c.”

DAVENPORT,

against

MASON.

THE appellee, obtained an injunction in the County Court, to a judgment rendered against him in the same court. After answer put in, a motion was made to dissolve; and on a hearing the court over-ruled the motion, but continued the cause and awarded commissions to take depositions. At a subsequent court, on hearing the bill, answer, depositions and exhibits, the court dissolved the injunction, and decreed the plaintiff in that court to pay costs.

From

From this decree the defendant appealed. The High Court of Chancery directed issues between the parties, which were accordingly tried and a verdict certified thereon. The Chancellor reversed the decree of the County Court, and decreed a perpetual injunction, from which *Davenport* appealed.

Mr. CAMPBELL for the appellant contended; that the decree of the County Court was interlocutory, since it only dissolved the injunction. That no appeal could have been taken until the decree was made final by a dismissal of the bill; until this was done, the cause was still depending.

Mr. MARSHALL for the appellee insisted, that this is a decree *for costs* and, as to that, is final. But if not final, then the County Court erred in decreeing costs, and therefore the reversing decree is right either way.

The court affirmed the decree of the High Court of Chancery.

RAGSDALE Executor of RAGSDALE,

against

BALTE Executor of BALTE.

THIS was an action of debt instituted in the District Court of *Brunswick* by the defendant in error against the plaintiff for £ 32: 4: 2 with interest thereon from the 16th of June 1770, also one penny, and 460lbs. of gross tobacco. The action was founded upon a judgment of the General Court rendered in the year 1784, in favor of the testator of the defendant against the plaintiff for £ 64: 8: 4, for debt, also one penny for damages, and 460lbs. of gross tobacco for his costs, but to be discharged by the payment of the above mentioned sum of £ 32: 4: 2, with interest thereon from the 16th of June 1770, together with the damages and costs above mentioned. Upon the plea of payment, a verdict was found for the defendant in error, in the year 1794; whereupon judgment was entered, "that he recover the said sum of £ 32: 4: 2, with interest from the 16th of June 1770," as also the damages and costs aforesaid.

The plaintiff applied for, and obtained a supersedeas to the above judgment, from one of the judges of this court, assigning as error therein, "that by the defendant's own shewing in his declaration it is manifest that he ought to have brought his suit for £ 64: 8: 4, instead of £ 32: 4: 2, with interest from 1770; whereby the interest recovered exceeded the sum for which the judgment, on which this suit was instituted, had been rendered."

Mr. Mansfield for the plaintiff shewed, that this was a case for error in law, and that the County Court was in error in its decision, and that the law was in favor of the plaintiff.

The court affirmed the decree of the High Court of Chancery.

RAGSDALE Executor of RAGSDALE

against

BALTE Executor of BALTE

THIS was an action of debt instituted in the District Court of Baltimore by the defendant in error against the plaintiff for £ 32: 4: 2 with interest thereon from the 10th of June 1770, also one penny, and 40lbs. of gross tobacco. The action was founded upon a judgment of the General Court rendered in the year 1784, in favor of the plaintiff for £ 64: 8: 4, for debt, also one penny for damages, and 40lbs. of gross tobacco for his costs, but to be discharged by the payment of the above mentioned sum of £ 32: 4: 2, with interest thereon from the 10th of June 1770, together with the damages and costs above mentioned. Upon the plea of payment, a verdict was found for the defendant in error, in the year 1794; whereupon judgment was entered, "that he recover the said sum of £ 32: 4: 2, with interest from the 10th of June 1770," as also the damages and costs above mentioned.



C A S E S
 ARGUED AND DETERMINED
 IN THE
 COURT OF APPEALS
 IN
 THE FALL TERM OF THE YEAR,
 1796.

LEWIS STEPHENS,

against

ALEXANDER WHITE.

THIS was an action on the case brought by the appellant against the appellee in the District Court of *Winchester*. The declaration states, that the plaintiff by the advice of the defendant, who was an attorney authorised to practice law, commenced in November 1779, in the County Court of *Frederick*, an action of debt for £ 62, against *B. Chambers* executor of *William Williams*, and then and there employed the defendant to prosecute the said suit to judgment, who in consideration thereof undertook to conduct the same to the best of his skill and judgment; yet the defendant had neglected to do his duty as an attorney, by failing to file a declaration, whereby the judgment obtained in the said suit was reversed, and the plaintiff had lost his said debts of £ 62 and costs, and had sustained injury to £ . . . Plea not guilty.

At the trial, the defendant filed a demurrer to the evidence, stating, that the plaintiff had proved by one witness, that after the judgment against *Chambers* had been obtained, the defendant

dant requested the witness to inform the plaintiff, "that he had recovered a judgment against *Chambers*, in the suit in which he the defendant had been employed by the plaintiff." That it also appeared from the docket of the court in which the judgment was obtained, that in July 1784, the letter *W*, was placed opposite to the said suit, and the clerk of that court proved, that that it was customary to write the initial letter of the attorney's name opposite to the suit in which he was concerned; that the letter *W*, on that docket, was intended to denote, that the defendant appeared as attorney at that court for the plaintiff. The same witness declared, that he believed *Peter Hogg*, then a practising attorney, ordered the said suit for the plaintiff, but of this he was not certain. That from the same docket it appeared, the suit was instituted in November 1779, and that in March 1780, no attorney appeared of record for the plaintiff; that the suit was put to issue in March 1783, and it did not appear from any evidence that the defendant appeared as attorney in that suit before July 1784. That the verdict was given in October 1784, in favor of the plaintiff for £ 61: 19: 3 debt, and £ 49: 11: 4 damages, and that the same was written on the back of an award, which was the only paper except the writ now filed in that cause. That the judgment was reversed with costs for the want of a declaration. That it did not appear that *P. Hogg* was marked as an attorney upon that docket after the year 1778. That *Chambers* always had been, and yet is, a resident in the state of *Pennsylvania*.

The demurrer being joined, the jury found a verdict for the plaintiff, and assessed his damages at £ 146: 18: 7, subject to the opinion of the court upon the demurrer to evidence.

The defendant then moved in arrest of judgment, 1st, because there is no consideration stated in the declaration, and 2dly, because no damages are laid.

Judgment for the defendant from which the plaintiff appealed.

LEE for the appellant. It is a general and well established principle of law, that if a man undertake to perform a professional act, he is chargeable for neglect to the person who employed him, although he has received no reward.

As to the want of damages in the declaration, this, if error independent of the act of *Jeofails*, is clearly cured by that act.

The judgment of the District Court having been given upon one or both of these points, I have thought proper to notice them first; but if there be any difficulty in the cause, I think it arises out of the demurrer to evidence,

The

The jury being the only proper judges of the weight of evidence, if either party shall chuse, by a demurrer to evidence, to withdraw the decision of the cause from that body, the court will make such conclusions from the facts stated, as the jury might have done, if they had decided upon them. The rule therefore is laid down in the case of *Cocksedge vs Fanshaw*, Dougl. 124, that a demurrer to evidence admits the truth of all facts which the jury might have inferred from the evidence.

Now the only question in this cause is, whether *White* was employed as the attorney in the cause? The message sent to *Stephens*, and the marks on the docket prove this fact. If it were necessary to establish the fact, that he was originally employed to commence the suit, or that he was employed at so early a period as to be chargeable with the neglect imputed to him of not filing a declaration, the jury had sufficient evidence laid before them to authorise a conclusion that the fact was so.

But it was not necessary to prove an original engagement in the suit; for although the appellee had been employed after the issue was made up, it was his duty to have moved the court for leave to file a declaration, and if he had failed in this attempt, he might have urged that fact in order to repel the charge of neglect. As things are, the debt is lost, not only by length of time, but by the non-residence of *Chambers*, and to the conduct of the attorney alone can it be attributed.

RONOLD for the appellee. The first point which I shall contend for is, that the District Court had not jurisdiction of this cause, because it can only hold plea of suits where the debt or damages amount to £ 30. In this case, there are no damages laid in the declaration; and it is in this point of view that I consider the omission to be clearly fatal. It is true that no plea was filed to the jurisdiction, nor was it necessary, since the court being confined to a particular sum, it ought to appear certainly upon the record, that the court has jurisdiction of the case.

Another ground upon which the judgment of the District Court may be sustained is, that the appellant gave in evidence a different judgment from that stated in the declaration. The breach laid is, that the judgment was reversed, whereby the plaintiff lost her said debt of £ 62, and costs. By the demurrer, it appears that the judgment given in evidence was for £ 61: 19: 3, and £ 49: 11: 4 damages. So that it does not appear that the judgment mentioned in the declaration was reversed, or the amount of it lost by the supposed negligence of the appellant,

WASHINGTON

WASHINGTON on the same side. The first question in the cause is, whether a sufficient consideration is laid in the declaration, or whether it was necessary to lay any at all? I have always supposed it be a clear principle of law, that a promise without a consideration of some sort, imposes no legal obligation upon the party who makes it. I admit, that if in such a case, he shall enter upon the performance of the act, and shall so mismanage it as to produce an injury to the other party, he will be chargeable with all the consequences. The doubt in this case is, whether it is sufficiently averred in the declaration, that the appellee *undertook*, and did *actually conduct* the suit? He is charged only with having *promised* to do so, and though the appellant (as it is stated in the breach) may have lost the debt in consequence of the appellee having failed to file a declaration, yet this might well happen, and still amount to no more than a *breach of promise*, made without consideration, and therefore not binding upon the appellee.

The second question is, whether the omission to lay damages in the declaration be fatal? If the damages found by the jury exceed those laid in the declaration it is error, and it can only be cured by releasing the excess; the same principal applies with equal if not increased force to a case where no damages whatever are laid. I cannot discover any clause in the act of Jeofails which cures this error. That act cures *mistakes* in stating sums of money, where they are truly stated in any part of the record; but this is not a *mistake*, it is a total omission to state any sum. The act also cures the omission of an averment of any matter, without proving which, the jury ought not to have given such a verdict, this clause applies only to the averments of such facts as are necessary to describe the plaintiff's case, and which being omitted, must have been proved to warrant the verdict. The truth is, that the objection in this case goes to the verdict itself, which finds more damages than are laid in the declaration.

I admit that the demurrer to evidence presents the most important and difficult question; can the court infer every fact which is necessary to sustain the action? It is essential to this action, that the appellee was employed at the time when the neglect which produced the injury complained of took place. If he were originally employed, it was his duty to have filed the declaration; if he were employed afterwards, to conclude what some other attorney had begun, that other attorney was liable for the neglect, and upon no principle of justice could his faults descend upon his successor. That Mr. *White* was employed,

ployed, is clear; the single question is at what period? If as *counsel to argue the cause*, he is not liable for slips committed *in the pleadings* by another, not employed *by him*; but by his client.

Now though it be true, that a demurrer to evidence admits the truth of all facts which can be *fairly*, and *consequentially* inferred from the evidence, yet that inference must grow necessarily out of the evidence. That Mr. *White* was employed in July 1784, the jury might, and this court may infer, though not positively proved; because the letter *W*, being affixed to the suit at that time, furnishes ground for the presumption; but because he was employed then, does it follow necessarily, or at all, that he was employed in 1779? That he instituted the suit, or neglected to file a declaration before 1783? These important conclusions do not grow out the facts stated. If *presumptions* are to weigh, they are strongly in our favor, for the appellee being marked in July 1784, and not before, it is probable that he was not sooner engaged.

It is said that the appellee might have moved the court for leave to file a declaration.—It may be doubted whether he was bound to do this, any more than a carpenter who undertakes to finish a house, is bound to pull it to pieces in order to rectify the blunders of his predecessor. But the breach is, *for failing to file a declaration in a suit advised and commenced by the appellee*, and not for want of skill, or for omitting to correct mistakes to which he was not privy.

MARSHALL on the same side. I admit the doctrine laid down in the case of *Cocksedge vs Fanshaw*, to be correct, but then, there must be some evidence stated in the demurrer from which the particular fact to be concluded from it, may fairly be inferred. If in trover there be a demand and refusal proved, the jury may, and (if those facts were stated in a demurrer to evidence) the court ought to conclude a conversion; But if the time of the conversion be important, neither of them could infer from those two facts, that it was at one, rather than at another period. The time when Mr. *White* made the undertaking stated in the declaration is all important, for being charged with neglect in that part of his professional duty which belongs particularly to his character of attorney (strictly speaking,) he cannot upon any principle be liable, if he were only employed at a late hour to *argue the cause*. For altho' the duties of an attorney and counsel belong in this state to the same lawyer where he is engaged generally to conduct a suit, yet they are certainly distinct,

ting, if he be employed after the pleadings are concluded. This observation will serve still farther to illustrate an argument which I now mean to urge. It is undoubtedly true, that a demurrer to evidence must not only shew that the plaintiff has a cause of action, but that he has also a right to recover *in that very action*. This declaration is upon a *special contract* to conduct the cause, from its commencement to its final determination, and the breach laid is in the non-performance of that special undertaking. It was therefore necessary to prove such a contract because the appellant might have been injured by neglect or want of skill in some part of the management of the cause, and still it might not be imputable to the appellee. Now what facts are stated in this record from which an inference could have been drawn by the jury, or can now be drawn by the court, that the appellee was engaged at any time prior to July 1784? There are certainly none which in the most distant manner lead to such a conclusion.

It is said that *Mr. White*, though employed at a late hour, might have moved for leave to file a declaration. The answer is, that this forms no part of the charge against him. If this had been really the appellant's case, the declaration ought to have stated "that he was employed after the cause was at issue, and that he failed to make such a motion. But in the present case, the negligence complained of preceded the contract as the evidence proves, whereas it is subsequent to it, according to the charge in the declaration.

LEE in reply. The objection to the form of the declaration, is that it does not aver what damages the appellant had sustained. But the statute of *Jeofails* cures the omission of all averments, which must necessarily have been proved to warrant the verdict; and as the jury in this case have ascertained the damages which the appellant had sustained, he must have proved to them the extent of the injury which those damages intended to compensate, or else it is not presumable that such a verdict would have been found.

As to the variance discovered by *Mr. Ronold*; it is not real. The declaration states the amount of the *debt due* to the appellant by *Chambers* and that in consequence of the appellee's neglect that *debt* was lost, but the amount of the *judgment* is not stated at all, and it does not follow necessarily, that the judgment was for the precise sum which the appellant supposed was due to him.

It is

It is strongly insisted by the counsel for the appellee, that it was essential to the support of this action, that the appellant should have proved the precise time when the defendant was retained in the cause. This is in most cases impossible, since warrants of attorney are never made in this country. But the jury might have concluded from the facts proved, that the defendant was employed early enough to have filed the declaration, and if so, this court will presume every thing against the person offering the demurrer. The essential fact of his having been retained being proved, the jury might well have inferred that he instituted the suit, and that, from the following considerations; viz; that it is most usual in this country to engage attorneys generally to conduct a suit from its commencement to its determination; that there was no proof that any other attorney was engaged; a fact which, if true, the defendant might have established; that the cause was not of that difficult nature to require an attorney to conduct the pleadings, and an assistant counsel to argue it; that some evidence of a special engagement ought to have been produced; in order to repel the presumption arising from the general custom of employing but one lawyer in plain cases, whose duty it is to conduct the cause throughout. From these, and many other considerations which might have weighed with a jury, the *circumstance* of time might well have been presumed.

This is by no means so special an action, as to have rendered it necessary for the appellant to prove the undertaking as laid, because the appellee being in the ordinary employment of an officer of the Court, the law implies a promise to do his duty.

ROANE, J.—The motion in arrest of judgment upon which the District Court alone gave an opinion, presents us with two questions; 1st, whether the omission to lay damages in the declaration, be fatal or not? And 2dly, whether the not laying of a consideration will vitiate the judgment?

I think that the first error may, upon the true exposition of the act of Jeofails be considered as cured, which declares 1st, that no judgment shall after verdict be reversed for *any* variance in the writ from the declaration, nor 2dly, for any mistake of the christian name, surname of either party, *sum of money*, &c. in the declaration or pleading, the same being right in any part of the record or proceedings, or 3dly, for omitting the averment of any matter, without proving which, the jury ought not to have given such verdict. The English statute of the

21, *James I, C. 13*, differs from the first member of this clause in this respect; that statute declares, that no judgment after verdict shall be reversed for any variance *in form only*, between the original and declaration &c. The omission of those words in our statute, will justify us in going farther than to cure a variance merely in form, because that statute being before our legislature, it is fairly to be presumed from the difference of expression, that greater liberality was intended by the framers of our law.

I also think that the 2d member of the clause applies to this case, and that we cannot properly distinguish between a *mistake* and the *omission* of a sum of money, since the same reason applies with equal force to either case.

I have great doubts whether this error could be cured under the construction of the third member of this section. This provision in our law is not taken from any English statute, but is the adoption of a principle established by the courts of that country. The principle as understood there, is, that where the plaintiff has stated his title or ground of action defectively, or inaccurately, it is a fair presumption after verdict, that all *circumstances*, necessary in form or substance to complete the title so imperfectly stated, were proved to the jury, because to entitle him to recover, they must, have been proved. *Rushton vs Aspinall*, Dougl. 658. But I question if the omission of damages can come within the above principle, since they form no part of the plaintiff's title; however I give no decided opinion as to this, since it is unnecessary.

The second point arising out of the motion in arrest of judgment is, that no consideration is laid in the declaration. It is stated that the plaintiff *then and there* employed the attorney, which is tantamount to stating that the plaintiff was then and there bound to pay him for what he had undertaken to perform. But the most complete answer to the objection is, that the appellee *undertook to conduct the suit*, and in his *management* of it, was guilty of such a neglect of his duty as to subject the plaintiff to a loss; after this, it is not competent to him to alledge a want of consideration.

The third point respects the demurrer to evidence. The judgment to be given is, that the evidence is, or is not sufficient to maintain the issue joined on the part of the appellee. Of this, the jury are the only competent judges, and therefore if the case be withdrawn from their decision by this mode of proceeding, the court must presume any and every fact, which the jury

jury might out of complicated testimony have infered. But those conclusions of facts must be such, as the jury might from *a just and reasonable construction have made*, and not arbitrary inferences, or such as might be drawn from a part only of the whole evidence.

The charge is, that the defendant commenced and mismanaged the suit. The evidence of the first witness, if it stood alone, might correspond with this charge, since a jury might consider the message sent to the appellant, as having reference to an engagement before made to commence and prosecute the suit. But the appellant not satisfied with this, produced the dockets of the court, which prove strongly, if not satisfactorily that the appellee was not retained in the cause until July 1784, and thus every presumption of an engagement at a prior period, arising out of the first piece of testimony, is completely demolished. With an accurate attention to the whole evidence, a jury could not reasonably and properly infer an original engagement, and consequently could not consider the charge laid in the declaration as being sustained. I therefore think, that the District Court was wrong in the opinion given upon the motion in arrest of judgment, but that the judgment upon the demurrer to evidence is correct.

CARRINGTON, J.—Upon the two first points, I entirely concur in opinion with the judge who has just spoken.

It is undoubtedly true, that an attorney is liable for neglect of duty, and that he is bound to make retribution to his client for the injury which he may thereby sustain. That there has been mismanagement in this case, is not denied; the instance stated and proved was in the failing to file a declaration; but there is no evidence, that the appellee was originally employed in the cause, so as to be properly chargeable with this neglect, nor are there any facts stated, from which such a conclusion could with any propriety be made. On the contrary, it is fairly to be infered, that he was not engaged until July 1784, and we all know, that it is very usual to introduce new counsel into a cause during its pendency, sometimes to conclude what another has begun, and at other times to assist in the management of it. It would be monstrous, if in those cases, the blunders of one attorney should be imputed to his successor, who was not privy to, or assisting in the commission of them.

LYONS, J.—As to the point of consideration, the rule is well laid down in the case of *Coggs and Bernard*, 2 *Ld. Ray*, 909. That though a man is not bound to do an act for another without

without a reward, yet if he will voluntarily engage, and enter upon the performance of it, he is liable for the consequences of his improper management.

The second point is, the omission to lay damages in the declaration. In actions which sound entirely in damages, it is absolutely necessary at common law to lay them in the declaration; but in debt it is otherwise. The plaintiff ought to know what are the damages he has sustained, and if he lay none, he cannot say that he has sustained any. If he recover more than is laid, he is not entitled to the excess, and in that case he can only help himself by releasing the excess. But no damages are laid, the plaintiff cannot remit so as to cure the error. In *Pilford's case* 10, Co. 116, it is laid down, that where damages are the cause of action, the plaintiff must declare for them, or else cannot recover; but it is said to be otherwise in real actions.

In cases where damages are the cause of the action, it was formerly the practice upon a demurrer to enter up judgment for the damages laid in the declaration; besides they give jurisdiction to the court, as is laid down in *Hardwick's cases*, page 6, where it is determined, that in actions founded in damages, those laid in the declaration are considered as the cause of action.

Thus the case would have stood independent of the act of *Jeofails*; but now, the declaration may be amended by the writ, since the mistake may be corrected by another part of the record where the sum is rightly stated. For although you cannot have advantage of the writ to plead a variance, without craving *oyer* of it, yet you may apply to it to amend by, though *oyer* was not taken. In England, it was formerly usual to stay proceedings in error until the amendment could be made below, and then to award a certiorari; but at this day, the court consider the amendment as *being made*, in cases where it would be proper to allow it *to be made*.

As to the variance spoken of by Mr. *Ronold*, it does not appear in the record as he supposed.

Respecting the merits of the case, as presented to us by the demurrer to evidence, I feel no difficulty. To make an attorney liable upon a charge of this sort, gross negligence should be proved. It is also necessary for the plaintiff to shew, that the attorney was employed *at a time* when he might have been guilty of the charge; if it be for failing to file a declaration, it should appear that he was engaged at a stage of the cause,

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when he ought to have filed it. If a tradesman be employed to complete a piece of work already begun, will any man say that he is responsible for the blunders and mistakes of another who had preceded him? Surely not. It is evident from this record, that the appellant was not employed before the year 1784, and of course after the cause was at issue.

The PRESIDENT, concurred in the opinion delivered by the other judges, and the judgment was affirmed.

BOGLE & SCOTT,

against

FITZHUGH.

THE appellants having recovered a judgment against B. Grymes in *Spotsylvania* County Court, issued a *capias ad satisfaciendum*, which was returned "not found."

The second *scire facias* against the appellant, the special bail, issued on the 23^d of April 1771, returnable to the October court following, which was likewise returned "not found."

At June court, in the same year the special bail brought the principal into court, and delivered him up in discharge of his recognizance. The plaintiffs refused to receive, or to charge the principal in execution, alledging, that it was then too late for the special bail to make the surrender, of which opinion was the court, the appellee then put in a plea which was joined.

Afterwards at a court holden in July 1773, the appellee again moved to surrender the body of the principal, in discharge of his undertaking as special bail, and the motion coming on to be reheard by consent of parties, the court were of opinion, that the render might then be made; whereupon the principal rendered himself up in discharge of his special bail, who was thereupon discharged from his recognizance, and it was further ordered, that the defendant should pay costs. From this order and judgment, the plaintiffs appealed and the same was affirmed in the District Court of *Fredericksburg* from whence an appeal was prayed to this court.

ROANE, J.—The only doubt which I have had respecting this case was, whether the District Court did right in affirming the last

last judgment of the County Court? It occurred to me upon the first impression of the case, that the County Court, having once decided the question finally, even the consent of parties could not give them jurisdiction, to rehear and redetermine it at a subsequent term. But upon further reflection, I am satisfied, that if the first judgment of the court was wrong, we may correct it, and now give the judgment, which ought then to have been given. That there is error in it, there can exist no doubt; the writ was made returnable to the *October* instead of the *May* court, as it ought to have been, and the offer to surrender, was prior to the return day improperly named in the writ. I think the proceedings ought to be reversed, and the first judgment of the County Court corrected.

CARRINGTON, J.—I discover no objection to the last judgment of the County Court.

It was a *renewed* motion; *brought on and reheard by consent of parties*, and it is every day's practice to reinstate suits, which have been dismissed, or tried, with the consent of parties, and thus to give jurisdiction to the court to rehear and determine them. The return day of the second *scire facias* as stated in the writ, was proper, or it was not; if the former, then the surrender was made before the return day, and consequently in good time; if the latter; then the court should have quashed it, in which case also, the bail was in time: So that either way, the first judgment was erroneous.

The objection as to jurisdiction, goes only to *original jurisdiction*; such, as for a Court of Chancery to try a cause for assault and battery, or the like. But in this case, the court had complete cognizance of the subject matter, and might properly rehear the motion which was brought before them.

The judges were formerly very strict, respecting the privilege of the special bail, to discharge himself after a return of *non est inventus*, upon the *capias* against the principal. The recognizance in strictness became forfeited by this return, and the plaintiff was, and still is at liberty to proceed immediately against the bail.

At first, the bail was allowed to discharge himself by bringing in the body before, or upon the return day of the first *scire facias*, afterwards greater liberality prevailed, and the indulgence was extended to the return day of the second writ.

In this case, the motion to surrender the principal, was made before the return day of the second *scire facias*, and though overruled upon the first attempt, no objection could exist against the repetition

repetition of it at a subsequent day. The *scire facias* being made returnable to an improper court, is merely void, and though it could not be amended, it ought to have been quashed. But being void, the bail had a right to take advantage of it, and deliver up the body of the principal. I am for affirming the judgment.

THE PRESIDENT. It is apparent, that the County Court acted in the first instance under a mistake, supposing the *scire facias* to have been returnable to *May* court, as it ought to have been, instead of *October*. If this had really been the case, their judgment would have been proper. Afterwards, the defect in the writ was discovered, and to prevent a writ of error, the consent to rehear the motion was probably accorded.

It is very true, that consent of parties cannot give jurisdiction, where the court has it not. But this principle is only applicable to a case of original jurisdiction. I think the judgment of the District Court right, and that it should be affirmed.

Judgment affirmed.

B U R K's Executors,

against

T R E G G's Executors.

IN March 1788, the appellees sued a writ of *scire facias* against *John Burk* and *Joseph Cross*, executors of *Henry Burk*, upon a judgment recovered by the testator of the appellees, against *Thomas Burk*, and the said *Henry Burk* the security for his appearance. The defendant *John Burk*, to whom alone the writ was made known, appeared, and after craving over of the *scire facias*, pleaded, 1st, no such record; and 2dly, "payment by *Henry Burk*, of the only debt recovered against him by the said *Tregg*, whereof there is any appearance of a record." Upon both pleas, issues were joined.

Both issues being found in favor of the plaintiffs, the former by the court, upon inspection of a copy of the judgment, and the latter by the jury, judgment was given for him. At the trial of the cause upon the first issue the defendant filed a bill of exceptions

ceptions to the opinion of the court, allowing a *copy* of the record of the *judgment only*, without the pleadings, to be given in evidence.

At a subsequent court, viz, in November 1789, the matters of law arising upon the bill of exceptions were argued, and decided in favour of the defendant, and judgment was entered for him, with costs against the plaintiffs.

An appeal was prayed to the District Court of *Fredericksburg*, pending which the appellee *John Burk* died, and a *scire facias* to revive, was awarded against *Thomas Burk* executor of the said *John Burk*.

The District Court reversed the judgment of the County Court and gave judgment, that the appellant might have execution against the appellee *Thomas Burk*, for the amount of the original judgment and costs of the *scire facias*, to be levied of the goods and chattels of the said *Henry Burk* in the hands of the said *Thomas Burk* to be administered if so much &c. If not then of the goods and chattels of the said *John Burk* deceased in the hands of the said *Thomas Burk* to be administered, if so much thereof he had.

From this judgment an appeal was prayed to this court.

ROANE, J.—The District Court did right in reversing the second judgment of the County Court, and by doing so, it in effect affirmed the first judgment of that court. Against that judgment it is objected, that a *copy of the original judgment* ought not to have been given in evidence. It is certainly a well established rule in England, that upon the plea of *no such record*, if the record be of the *same court*, it ought to be inspected, and it is not sufficient to produce a copy in evidence. I do not know that in this country, that rule has ever been changed, nor do I think it ought to be. There are many imperfections in the record, but as I am clear that the judgment of the District Court, which affirms the first judgment of the County Court is wrong, and must for that reason be reversed, it is unnecessary to take notice of any other error.

CARRINGTON, J.—I concur in the opinion just delivered although it has been common in this country to give copies of judgments in evidence, because the practice has never been controverted, yet I am clear, that the *record itself*, where it is of the same court, should be inspected.

LYONS, J.—It was irregular in the court to try the plea of payment, before it had been established whether there was such a record as the one set forth in the pleadings. I agree with
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the other judges, that where the record is of the same court, it is not proper upon a plea of "no such record," to give a copy in evidence. The record itself should be inspected; if there be a variance, the minute book may be resorted to, if it be of the same court; if of another court, there should be a full and complete record produced. Whether in this latter case, the seal of the court should be annexed, I will not say, as many courts have no seals, though they are required by law to provide them.

There are many other errors in this record. The judgment should have been against both executors, although the *scire facias* was made known, to only one of them; but the costs in that case should have been awarded against him only who appeared and pleaded. The County Court were also wrong in reversing at a subsequent court, the judgment they had given at a former one. But as the court are agreed upon the point of evidence, it will be unnecessary to give any opinion upon any other part of the record.

Judgment of the District Court reversed with costs, to be levied of the goods and chattels of the testator *William* in the hands of the appellees to be administered; if so much &c. but if not, then of their proper goods and chattels. And the court proceeding to give such judgment as the said District Court ought to have given, is of opinion, "that the said *John Burk* having pleaded, that there was not any such record of the judgment as set forth, and supposed in the writ of *scire facias* in the proceedings mentioned, and the record denied by the said plea being the record of the said County Court of *Caroline*, as the appellees in replying, said they were ready to verify by the records of the said Court, the copy of the record of the said judgment in the bill of exceptions mentioned, ought not to have been allowed to go in evidence to the jury, on the trial of the issue, but that the original record ought to have been produced in court for inspection, and that the judgment of the said County Court is erroneous."

Judgment of the County Court reversed, with costs of the appeal in the District Court to be levied of the goods and chattels of the testator *Henry* in the hands of the appellant to be administered, if so much thereof he hath: Verdict set aside and a new trial awarded.

DRUMMOND,

against

CRUTCHER.

THIS was an action of debt brought in the County Court of *Caroline*, by *Drummond*, assignee of *H. Crutcher*, against the appellee upon an assigned bond. The defendant put in the plea of payment, and at a subsequent term being allowed to amend, pleaded that the debt was due to a British subject and not recoverable in any court of this commonwealth, issue was joined upon both pleas.

At the trial of the cause, the plaintiff filed a bill of exceptions, stating, that the defendant had been permitted by the court to give in evidence to the jury, that a certain *James Fletcher*, who was then dead, (and who it was discovered by an indorsement erased by the stroke of a pen, had been an indorsee) had said, that he had put a bond of *H. Crutcher* senior, to *H. Crutcher* junior, into the hands of *Wallace & Co.* to which evidence the plaintiff objected, but was over-ruled by the court: That the plaintiff moved the court to instruct the jury, that the mere possession of a bond, without indorsement, did not give a complete right to the same, to the possessor, but the court determined that the possession did vest the right.

The judgment of the County Court which was for the defendant, being upon an appeal to the District Court reversed, and the verdict set aside, the cause was retained in that court for a new trial.

At the trial in the District Court, the plaintiff filed a bill of exceptions, stating, that the plaintiff had offered in evidence, a bond, given by the defendant, to *H. Crutcher*, upon the back of which had been endorsed, an assignment by *H. Crutcher* to *James Fletcher*, which said assignment had been stricken out by the mark of a pen, except the signature of *H. Crutcher*, and an endorsement to the plaintiff substituted in its place, just above the name of the assignor *H. Crutcher*, in a different hand writing from the first endorsement. That the court refused to suffer the bond with the endorsements to go in evidence to the jury.

Verdict and judgment for the defendant, from which the plaintiff appealed.

ROANE,

ROANE, J.—The only question is, whether the evidence offered by the plaintiff, corresponded with the case alledged in the declaration, or not? If it did, then it was proper, and should have been admitted by the court; if otherwise, it was rightly rejected.

The declaration states a bond given by the defendant, to *Henry Crutcher* and an assignment thereof to the plaintiff. It was therefore necessary, that the bond produced in evidence should answer this description. I think it did so, notwithstanding the appearance of a prior assignment, which being erased, produced in itself no variance between the case alledged, and that proved.

The bill of exceptions states, that this endorsement had been erased; but *when*, or by whom does not appear. It may have been made by the obligee himself, who might never have parted with the possession of the bond, until the assignment made to the appellant. If indeed it had appeared, that there had been foul or improper conduct in the transaction, on the part of the appellant, it might have been otherwise.

But as the case comes up, the only question is, *as to the fitness of the allegation to the evidence.*

CARRINGTON, J.—I entirely concur in the opinion just delivered. It is a naked case which exhibits no other point than what respects the correspondence between the proof and the case stated; and as it appears to us, there is no variance between them.

LYONS, J.—Concurred.

Judgment reversed and a new trial awarded with costs.

MACKIE'S Executor,

against

DAVIS, &c.

THIS was an action on the case brought by the appellees against the appellant, in the District Court of *Williamsburg*. The declaration contained three counts. The first stated that the testator *Mackie*, being indebted to the plaintiffs in the sum of

of £ 1000, for money laid out and advanced for his use, and being possessed of a bond of one *M*, to that amount, a conversation was had between them &c. whereupon it was agreed, that *Mackie* should assign over the said bond to the plaintiffs, and that the plaintiffs should receive the same, and should demand payment of the said bond from the said *M*, and on failure to pay, that they should bring suit upon the said bond, and should prosecute the same in a reasonable time to judgment and execution, and that the said *Mackie* should be discharged from the sum of money then due as aforesaid, but in case all or any part of the said bond should be undischarged on demand, and suit as aforesaid should be prosecuted and judgment obtained and execution should thereupon be sued out, and on return thereof there should not be wherewith to satisfy the same, that then the said *Mackie* should make good the whole, or such part of the said bond as should then remain due; that in consideration of the plaintiffs promise to perform their part of the said agreement, the defendant promised to perform his part of the agreement. That the plaintiffs did demand payment of the said bond according to the tenor of the said agreement, of which they received £ 100, in part thereof, and no more, and on refusal to pay the balance, they had in a reasonable time brought suit upon the said bond, recovered a judgment, and sued out an execution in due form of law, on which execution, it was returned, that there were not effects wherewith to satisfy the said debt, and that the plaintiffs have discharged the said *Mackie* from the debt first due. 2d count, That the said *Mackie* being indebted to the plaintiffs in another sum of £ 1000, did in consideration that the plaintiffs would release him from the said debt, assign to them another bond for the same amount due from one *M*, which assignment was made according to the act of Assembly in that case made &c. whereby the defendant became liable on default of the said *M*, to pay the plaintiffs all such sums of money as should remain due on the said bond; the breach is, that the said bond except £ 100 is yet due, and that the plaintiffs are unable to recover the same, and the defendant being so answerable did assume to pay the plaintiffs the balance of the said bond yet due. 3d count for money had and received to the use of the plaintiffs.

Upon the pleas of *non assumpsit*, and the act of limitations, the jury found a verdict for the plaintiffs, subject to the opinion of the court, "whether an action can be maintained against

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the endorser of a bond, or his executors, without any special undertaking on his part to insure the payment thereof.

Judgment for the plaintiffs in the District Court, from which the defendant appealed.

WASHINGTON argued the cause for the appellant. I am not concerned in this cause; but as it involves a question which may arise in another case before the court, in which I am engaged, I will beg leave now to state my sentiments upon the subject.

I shall consider the question generally, whether the assignor of a bond, without a special contract, is liable, in case of inability in the obligor to pay?

The material grounds of the action of assumpsit arising from an implication of law, are, 1st, To recover back money paid under a mistake, or through deceit. 2dly, To recover money paid for a consideration which happens to fail. 3dly, To recover money paid to one acting under a void authority. 4thly, For money obtained by extortion &c. 5thly, For money embezzled, of which a person has been defrauded by cheating, and 6thly, For money received on a judgment which is afterwards reversed. If the present question can be brought within the principle of any of these cases, it must be the second.

I shall here make a concession, which will at once shew the full extent of the application which, I suppose, may be made of the principle authorised under this head. If the assignor have no interest in the thing assigned, as if he be not entitled to the bond, or if the same hath been before satisfied, whether with, or without his knowledge. I will not question his liability in this form of action; for in either of those cases, there is a *total failure of the consideration*. He receives a consideration upon the avowed sale of something, namely a debt due, when in fact, there is no debt due at all, or if due, he has no title whatever to receive, or to dispose of it. So, if a man sell any other chattel, to which he has no title, this action will lie to recover back the money paid for it, upon the principle, that the consideration had failed. The reason is, that in all sales of personal property, there is an implied contract on the part of the vendor, that he has a right to make the sale, and for a breach of this implied contract, assumpsit to recover back what was paid will lie.

But the implied contract goes no farther. If the assignor have a title to the debt of which the bond is the evidence, there is at the time, an existing, and valid consideration given. A future

ture diminution or loss of the debt, can never upon any principle relate back to the contract, so as to destroy it, any more, than the subsequent death of a horse would, or the burning of a house in the possession of the vendee. I will go farther, and admit, that if the assignor be guilty of fraud, as by misstating the circumstances of the obligor, or even by concealing them, (if known to him) he might be liable; not because the consideration had failed, but on account of the fraud.

There is certainly no ground to create an implied assumpsit that the assignor will pay, if the obligor cannot. An implication of this sort must be a necessary one, or such as grows essentially out of the justice of the case. If the consideration fail, it is a just and natural implication that the money should be repaid; but if it turn out to be less valuable than the vendee or assignee supposed, (the vendor being clear of fraud,) it is only an unfortunate speculation, which the vendee must bear. Such an implication is inadmissible on another ground; because it being in the power of the parties to stipulate for such a responsibility, their silence on the subject, is strong evidence that it was not intended.

Bonds are as much articles of traffic as any other personal property; their value depends upon the ability of the obligors to pay, and of the assignee to wait for his money. They never command their nominal amount. Consequently, in bargains of this kind, the purchaser will inform himself of all those circumstances, which may enable him to decide upon the value of the bond; if he deceive himself, he has no person to blame. If the obligor be able to pay at the time of the assignment, but from an unexpected accident become afterwards disabled, ought the loss to fall upon the assignor, who if he had retained the bond, might in some way have got satisfied? If the assignor can be made liable under an implied assumpsit, in case the obligor *cannot*, with equal propriety, would he be liable in case the obligor *would not* pay, and this would assimilate the case of bonds to bills of exchange without the custom which regulates this liability in the latter case, as I shall presently shew.

There is a much stronger reason, why the assignor of a debt not legally transferable, should in such an event be made liable, than in a case of this sort; for in that, it might with some plausibility be contended, that since the debt could not be sold, or transferred, the assignment, which must be construed to mean something, could only mean *that the assignee should receive the money*. But the assignment of a bond being necessary to trans-

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fer a legal right to the money, its use is apparent, and leaves no room for presumption.

I have thought proper to consider this question upon common law principles, before I notice those cases which may seem to have an influence upon it.

As there are two instances, in which the assignor of a negotiable paper may be made liable in default of payment, they must be noticed, and examined; these are the cases of bills of exchange, and of promissory notes. The right of recovery in the first is created, not by the common law, but by the *custom of merchants*. The common law only provides the remedy. An implied contract between the assignee and the assignor is created by the *law of merchants*, which when once established, brings the case within those common law principles where the action of assumpsit is warranted. By the very act of drawing, a man, by the *mercantile law*, is understood impliedly to engage, not only with the payee, but with every subsequent holder; that the drawee is to be found at the place at which he is described to be, that if the bill be duly presented he will accept it, and when due, that he will pay it, if presented in proper time.

In default of any of these particulars, his implied contract is broken, and if the holder perform the implied conditions on his part, the drawer is liable. But what law, what custom has sanctioned the presumption of a like implied contract in the case of bonds? And without such a supposed engagement, there is no common law principle to warrant a recovery. The law of merchants is in commercial matters, what municipal law is in the common transactions amongst men. We cannot fairly reason from cases governed entirely by that law, to others not under its influence. As to promissory notes, the right of recovery against the endorser is expressly given by the statute of 3d and 4th Ann. C. 9, and from this provision, an invincible argument is to be drawn in favor of my position; for if in a commercial country, like England, it was necessary for the legislature to provide a remedy against the endorser of a promissory note, it is obvious, that no such right existed at common law.

Another, and a still stronger argument to prove the same conclusion is furnished by our laws. The act of 1748, in express terms, provides a remedy against the drawer or endorser of a bill of exchange, authorises the assignment of bonds and notes of hand, and yet is silent as to the liability of the assignor.

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The same subject is taken up in the revision of the laws but a few years past; the importance of this sort of negotiation was better understood; the statute of *Ann* was before the legislature, to prove that legislative aid was necessary to produce this liability, and yet no such provision was made.

I hold it that legislative interference is necessary; that if bonds are in this respect to be likened to bills of exchange, some system should be established similar to that *enacted* (if I may use the expression) by the law of merchants. For I would ask, upon what conditions, and at what time is this responsibility to commence? When does the action accrue? Is a demand and a refusal sufficient; Must there be a judgment and execution? Must there be an actual insolvency in the obligor proved, or will a return of *nulla bona* suffice?

If the court determine that the assignor is liable, there will be a necessity, to complete the system, that all these points be fixed; for else, the difficulties which attend his question will be rather increased than diminished.

The mercantile law respecting bills of exchange is perfect upon this subject; the drawer or endorser is liable, but upon certain conditions; the bill must be duly presented, then protested, and afterwards, notice thereof given immediately to the persons who are to be charged, which gives them an opportunity to save themselves. If we adopt the same principle, it behoves us to borrow the same regulations; and the question is, if this be the work of a legislative, or of a judiciary body? I think it cannot belong to the latter.

WICKHAM for the appellee. The act of Assembly, by authorizing the assignment of bonds, does in effect put them upon the footing of other negotiable papers, except in one particular instance, which is specially provided for; I mean, the right of the obligor to discount against the assignee, payments made to the obligee before notice of the assignment.

It is admitted, that in the case of a bill of exchange, the indorser is liable; but it is contended, that this is by the custom of merchants. I believe no case can be produced to support this idea for in the action against the drawer, it is not necessary to set out the custom, as it is in an action against the acceptor, 3 *Bac. ab.* 614. The custom of merchants regulates the steps necessary for the holder to pursue, and annexes conditions which if not performed, may defeat his right to recover. But the right itself is founded in common law principles. The indorser sells to the indorsee, the money, of which the bond is but
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the evidence, and impliedly undertakes that it shall be paid; if not, that then he will make it good. The assignment, like an order drawn, is evidence of so much due from the assignor, in case the money is not paid by the obligor, or drawee. The assignment of a bond is in the nature of an order drawn by the creditor upon his debtor, directing him to pay to the assignee the contents of the bond, with this single difference; that if it had been an independent order, not transferring at the same time a right to the evidence of the debt, as well as to the debt itself; a demand upon the drawee *and his refusal*, would entitle the payee to recover of the drawer; for without acceptance, the payee could maintain no action against the drawee. But the assignment of the bond itself, conveying not only a right to the debt, but a legal right to *sue*, the assignee ought to pursue the obligor as far as he can, before he resorts back to the assignor; because such would naturally be the understanding of the parties at the time of the transfer.

When bonds are endorsed for valuable consideration, it is always to be presumed, that a precedent debt was intended to be thereby discharged. That they may sometimes be sold, I shall not dispute, but there are so many cogent reasons against such a traffic, that it is never to be presumed, unless the contrary appear. A bond is but the evidence, or representative of money, and therefore may properly discharge a pre-existing debt. This was undoubtedly the use which the legislature supposed would be made of bonds, when assignments of them were permitted. It was never contemplated, that they were to become a subject of speculation. If a bond be assigned in consideration of a precedent debt, it will be admitted that the debt is not thereby discharged without a special agreement for that purpose. The reason of this will apply with considerable force, even to the case of bonds actually sold. It is the *payment* of the money, not the bare *assignment* which forms the consideration in either case; if the money be not paid, the consideration fails, as completely, as if no such debt had in truth existed. Where is the difference to the assignee? The question in substance is always the same, namely, has the assignee received the consideration, for which he paid his money? For unless he has, the vendor cannot *ex æquo et bono* retain what he has received.

This case is assimilated (tho' I think not very aptly) to that of the sale of personal property. But admit the likeness for a moment, and the argument on the other side will not be thereby strengthened. One man then sells to another a horse, or so

many bushels of wheat in the possession of a third person, and sends an order for the delivery; the person on whom the order is drawn, has the property actually in possession, but afterwards sells it, destroys it, or refuses to deliver it up. Will not the vendor be liable, upon his implied contract, not only that the property was his, and in existence, but also that the holder would deliver it on demand? Such is the nature of an assignment of a bond, which in truth, is the mere transfer of so much money of the assignor's lying in the hands of the obligor; it is not the sale of the paper and wax; for that might have been sold without the aid of the legislature.

No argument of weight can be drawn from the statute of *Ann*, the professed object of which, was to assimilate promissory notes to bills of exchange; to ascertain the time, and terms of the endorser's liability.

The argument, that an implied agreement on the part of the assignor, cannot be presumed, because the parties might have expressed it, proves too much; for it would defeat such an implication, in cases where it is admitted to exist; such as the implied warranty upon the sale of personal property; and in cases, where the consideration happening to fail, a promise to repay the money, is implied.

As to the difficulties apprehended by the counsel for the appellant, they are not insurmountable. It is not necessary for the court to specify, at what period, or upon what conditions the remedy against the assignor may be pursued. It is sufficient, if it be laid down, that *due diligence* to recover the money from the obligor must be used; and what is *due diligence*, must always be a fact fit for the determination of a jury, upon the whole evidence submitted to them.

RANDOLPH on the same side. I shall endeavor to shew, that the liability of the assignor is founded in common law principles. The examples of implied assumpsits mentioned by Mr. *Washington*, are entirely correct, but I cannot perceive, why they were enumerated, unless for the purpose of diverting our attention from a *general* principle, not coming literally within either of those mentioned by him, but which must decide this question. This principle is laid down by *lord Mansfield*, in the case of *Moses vs M^r Parlant*, 2 *Burr.* 1068, in answer to an objection against the defendant's being obliged to refund money, which he had improperly recovered in an adversary suit. I will quote his words: "If the defendant be under an obligation, from the ties of natural justice, to refund, the
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law implies a debt, and gives this action, founded in the equity of the plaintiff's case, *as it were upon a contract.*" Again, he lays it down, that this action will not lie, if in conscience and justice, the defendant ought not to keep *the money*. Now for the application of the principle; if the debt had not been due to the assignor, it is admitted that he would have been liable. Why? Because the consideration having failed, the assignor *ex æquo et bono* ought not to keep, what he had received, and he is presumed to have contracted to refund it. But is the situation of the assignee better, or is his equity less cogent if the obligor be unable to pay? In both cases, he loses the thing purchased, and paid for, *and consequently*, in both, the consideration has failed. Nor is the situation of the assignor made worse, so as to create in him an equity, strong enough to repel that of the assignee; for the debt might as well have been lost in the hands of the former, as of the latter.

The only difference between the assignment of bonds in *England*, and in this country, is, that in the former, the right to *sue* in the name of the assignee is not transferred, and therefore it is accompanied with a power of attorney. If the money cannot be recovered, it is not questioned but that the assignor is liable, whether he *sold the claim* or *paid it away in discharge of a precedent debt*. And why is he not equally liable, where by the assignment, he puts it in the power of the assignee to use his own name, instead of that of the assignor?

It is supposed, that we must seek to shelter ourselves under the likeness, which bonds, when assigned, bear to bills or statutory notes. I disclaim the comparison, and shall consider this case as standing upon the same ground, as notes of hand did before the statute of *Ann.* It is not true, that the right of recovery against the indorser, was created by that statute; for prior thereto, the assignee had only to demand the money from the drawer of the note, and on refusal he was at liberty instantly to sue the indorser. *Lambert vs Oakes* 1 *Ld. Ray.* 443, it may possibly be said, that notes were within the custom of merchants, as well as bills; but this is not the case, *Kyd* on bills 12.

I do not consider it necessary, that a suit should be brought at all against the obligor; for if upon demand, he refuse to pay, the assignee may pursue his remedy against the assignor, as in the case of promissory notes at common law. It is like the case of a covenant to make a good title to lands, where, if it be not in the power of the vendor to do it, the vendee may sue immediately

diately upon the covenant, without waiting the issue of a previous suit to try the title.

Many difficulties have been suggested, and thrown into our way, which tho' they may embarrass us, can never change well established principles. I will attempt to answer them, tho' it is certainly not necessary. What is the degree of diligence which the assignee is to use, in demanding, or (if a suit be necessary,) in suing for the money? The answer is, that the jury will always determine that question upon the circumstances of each case; there are a variety of instances in which the law has determined what is convenient time.

It is asked, can all the assignors be sued, separately or together? I think they cannot. There is a privity of contract between the assignor and his immediate assignee, and consequently, the latter can go no farther back. It is like the case of a warranty, where the covenant can extend only to the parties immediately contracting.

WASHINGTON in reply. The argument, that the plaintiff may recover, where the defendant has received money, which *ex æquo et bono* he ought not to retain, may prove any thing, or nothing in this case. In the application of it, the counsel are compelled first to beg the question. Is the assignor bound in conscience to refund? If the consideration has failed, he is; but if a *real consideration were given*, he is not. It is contended, that the consideration has failed, and so it would have done, if it had been a sale of a horse, which instantly after died. If the thing sold had a real existence, and the vendor had a right to sell, the subsequent loss of the debt could no more bind the conscience of the assignor, than it would that of the vendor of a horse, in the case supposed.

The assignment is resembled to an order upon the obligor to pay. The likeness might be more easily discerned, if it were the case of a paper *not negotiable*; for then, it could only be construed as a direction how the money should be paid. But being assignable, the obligee sells his right to the bond, in the same manner as he might dispose of his right to any personal chattel whatever; the implied contract is the same.

The case of *Lambert vs Oakes*, as reported in *Salk.* 127—12 *Mod.* 244, and *Holt. Rep.* 117, appears to have been that of a bill of exchange. So that nothing can be thence inferred, to do away the strong presumption, to be drawn from the statute of *Ann*; namely, that legislative aid was necessary to subject the endorser.

ROANE,

ROANE, J.—This is an action on the case, brought by the assignee of a bond, to recover of his immediate assignor, compensation on account of the non payment of the bond by the obligor. The first count states a special agreement of the assignor to be liable on failure of payment. The second, states the liability, as a legal inference from the assignment for valuable consideration, and the non-payment by the obligor. The third count is for money, had and received. But the case as stated by the jury, allows no ground to presume a special agreement, and therefore, we must decide this as a general question. That question is, whether an action can be maintained against the assignor of a bond, without a particular undertaking on his part to insure the payment? That due diligence was used by the appellees to recover the money from the obligor, is admitted by the verdict, and therefore, this circumstance will be considered as forming a part of the case.

In the cases of bills of exchange, it is admitted on all hands, that an action will lie against the drawer or endorser, if payment be not made by the drawee; but it is contended, by the counsel for the appellant, that this arises out of the custom of merchants. As against the acceptor, the argument is correct. He undertakes to pay the debt of another, and consequently, can only be charged in a special action on the case, founded upon the custom of merchants. But against the drawer or indorser, *indebitatus assumpsit* will lie, because the draft in itself imports a debt to be due. Promissory notes, stand in the same situation, the indorser being considered as a drawer. It is on account of the privity between the indorsee and the indorser, that this action may be maintained. The action is not founded on the bill or note, but upon the implied undertaking, and the bill or note, is evidence only of that undertaking. These principles owe their existence, not to the custom of merchants, but to the common law.

Let us pursue these principles, and they will give light to the further investigation of this question. The case of promissory notes will be an important guide, and therefore it will be proper to see, how they stood, previous to the statute which it is supposed created the liability of the indorser of them. *Lambert vs Oakes*, is most correctly reported in *Ld. Ray* 443, as the observations made by *Kyd* in his treatise on bills of exchange, page 109, incontestably prove. This case was decided antecedent to the statute of Ann, and was consequently governed by the principles of the common law. It was there determined

determined by *lord Holt*, that the indorsee of a promissory note, might recover against the indorser, if payment of the note had been demanded and refused. It would seem as if this case decided the question. Bonds in *England*, are not assignable, and therefore stand in the same situation as notes of hand did at the time when this case was determined. I can see no reason, why the assignor of a bond should not be liable in the same manner, even in that country, though I do not at present recollect any such case.

In this country, the assignee of a bond acquires a legal right to bring suit upon it, and to receive the money, discharged from any controul of the assignor over the subject; it is therefore his duty to bring suit. The assignment does in itself import a debt due to the assignee, and there is the same privity of contract between the two parties, as exists in the cases of bills and notes. They are all governed by the same common law principle, and consequently, an *indebitatus assumpsit* will lie in this country against the assignor of a bond, in the same manner, as it will in *England* against the indorser of a bill or note. The object of our law was not to defeat this common law remedy, but merely to give a right to the assignee to sue in his own name, which otherwise he could not have done.

The same common law principle will extend much farther than the case now before the court. I have no doubt, but that it will reach the case of a transfer of a bond without an assignment, and that the transferee having used due diligence to recover the money, may maintain an action against the person from whom he obtained it, for money had and received; the assignor can defend himself only by an express stipulation to the contrary. In the case of bills, transferred by delivery only, it is laid down in *1 Ld. Ray, 442*, that the person making the transfer ceases to be a party to the bill; that it is a sale, and the seller not bound to refund, if the bill be not paid. But *Kyd* in his treatise on bills of exchange page 60, very properly observes, "that this is only true in the case of a demand by a subsequent party, when several have intervened between him and the person against whom the demand is made; it can never apply as between the immediate parties to the transfer; for though the person who has given the money for the bill or note cannot recover against the person who received it, as indorser, he may recover in an action for money had and received for his use, as the transferer must be understood to undertake for the

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bill being duly paid." This is certainly sound doctrine. I am for affirming the judgment.

CARRINGTON, J.—Independent of those principles of the common law, which create on the part of the assignor of a bond, an implied undertaking to pay, if the obligor does not, the general understanding of those who enter into negotiations of this sort, would be sufficient to make the assignor liable. The assignee, purchases principally upon the credit of the person from whom he receives the bond. He is not always acquainted with the obligor, or with his circumstances.

The difficulties which were mentioned at the bar, are not insurmountable. Whether due diligence had been used by the assignee to recover against the obligor would necessarily be a matter in issue between the parties, and would upon all the circumstances of the case be decided by the jury.

As to the extent of the assignor's liability, I think it can only reach the sum actually received, in case the obligor is able to prove it. If he cannot do this, it is to be presumed that he received an equal sum with that due upon the bond. If incautiously, the consideration actually received be not stated in the assignment, and it can no otherwise be proved, a court of equity is open to the assignor, and he may there seek a discovery of that fact.

As to the lengths which it behoves the assignee to go in pursuit of the obligor before he can resort to the assignor, it is unnecessary to lay down any general rule; it may suffice to say, that in the present case, he went far enough.

LYONS, J.—There is in this case, but a single question propounded by the jury; which is, can the assignee of a bond maintain an action against the assignor, without a special undertaking by the latter to insure the payment? No facts, or circumstances are stated, from which it can be presumed, that the assignment was conditional, or that it was such, as in any manner to discharge the assignor from all recourse against him.

To get at the real point in this and similar questions, we should first settle, what is the essence of the contract which the parties enter into? what is it that is disposed of by the one, and acquired by the other?

In the sale of lands, the vendee purchases *soil*, not parchment. If it be a bill of exchange, a note of hand, or bond, it is *money* in the hands of a third person, which is given in exchange, by the person to whom it belongs, for another sum of money, or for something else which he deems equally valuable.

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The *paper*, is only the evidence of his right, and in itself has no intrinsic worth. In this case, we are to presume, that a full consideration was given, which could not have been for the paper and wax, but for the money, which the bond imports to belong to the assignor. If a full consideration had not been paid, that might have been a circumstance, from which the jury might have inferred a special agreement on the part of the assignee, to take the bond without recourse.

The right of the assignee to resort back to him from whom he acquired the bond, is bottomed upon principles of common law. There is an implied agreement by the assignor, that the money which he sells, and for which he receives an equivalent, shall be received by the purchaser, as much so, as if any personal property whatever were the subject of the contract. There is no reason, why an implied warranty should not exist in the sale of bonds, as well as in the sale of other property.

If this right then existed antecedent to the act of 1748, which made bonds assignable, how is it affected by that law? New rights are acquired under it, and the inconveniencies of the common law, which obliged the assignee to use the name of the assignor, are removed.

But this is obviously intended for the benefit of the *assignee*, and cannot be construed consistently with the spirit of the law, to deprive him of pre existing rights. The legislature could not mean to provide him with a new remedy, and at the same time to lessen the security which he before enjoyed, nor does such a consequence grow out of the law. It was strongly insisted upon at the bar, that such a conclusion was fairly to be made, because a remedy against the assignor was not given. The answer to this is, that it was not necessary; and since it is not expressly taken away, it still continues to exist as it did before the statute was made.

Upon the whole I am of opinion, that the assignor is liable, unless there be some special circumstances to shew that it was not so intended by the parties, at the time the assignment was made.

Judgment affirmed.

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NORTON,

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ROSE.

THIS was a bill exhibited in the High Court of Chancery by the appellant, to be relieved against a judgment at law recovered against him by the appellee, upon an assigned agreement for the payment of money.

The equity stated was, that the plaintiff had bound himself to pay to *George Anderson*, £ 450, being the balance supposed due upon a settlement of accounts; that he had insisted upon certain credits for money paid by *Charles Harris*, to *George Anderson*, to a part of which, he, the plaintiff, was entitled. But that the plaintiff, relying upon *Anderson's* assurances, that no payments had been made to him by *Harris*, and that he was insolvent, executed the following agreement viz: "We *John H. Norton* and *George Anderson*, have this day entered into a final settlement of all our accounts of every denomination whether in bonds, open accounts, bills, money, or traffic of all and every kind, from the earliest period to this day, and we agree, that there shall be paid to the said *George Anderson* by the said *Norton*, (as soon as he can possibly effect the same) £ 450, which is to be considered as full payment for every debt that may have been due, and is due at the present date from the said *Norton* to the said *Anderson*, as also for all and every transaction the said *Anderson* has had with any person in which the said *Norton* held an interest in any manner whatsoever. The above payment to be made on, or before the 1st of January next." This agreement was signed and sealed by *Norton*, who at the same time received a counterpart thereof; sealed by *Anderson*.

The bill further states, that after the execution of the above deed, the plaintiff drew an order upon *Wilson* and *John Nicholas*, in favor of *Anderson*, for £ 450, in discharge of the sum mentioned in the above deed, but that it was neither accepted, paid, nor returned to the appellant.

The bill prayed an injunction against a judgment obtained upon the aforesaid agreement by the defendant *Rose*, as assignee thereof, to be allowed all discounts which he could make appear

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against

against *Anderson*, and for general relief. An injunction till further order was awarded.

The defendant *Rose* by his answer denied any notice of the plaintiff's equity; at the time of the assignment made to him, and insisted that he was a *bona fide* purchaser of the debt in question for valuable consideration paid to *Anderson*.

The depositions in the cause established the receipt of a sum of money by *Anderson* from *Harris*; but no proof of the plaintiff's title to any part of it, or respecting the order drawn upon *Nicholas*, was exhibited.

The cause being set down as to the defendant *Rose*, (*Anderson* not having answered,) the court delivered the following opinion, "that the order stated in the bill to have been drawn by the plaintiff upon *Wilson* and *John Nicholas*, payable to the defendant *George Anderson*, could not have been legally discounted against the debt claimed by the other defendants in virtue of the deed acknowledged by the bill to have been executed by the plaintiff; and that the plaintiff cannot set off against the said debt any equitable demand which he may have a right to claim from the said defendant *George Anderson*." The bill was dismissed as to the defendant *Rose*, and the cause continued as to *Anderson*.

From this decree, *Norton* appealed.

WICKHAM for the appellant. The question is, whether a bond, in the hands of an assignee without notice, is discharged of an original equity existing against it? I shall contend, that it is not. 1st, Upon general principles of law, and 2dly, upon the just construction of the act of Assembly which permits bonds to be assigned.

The assignment of a *chose* in action, cannot so far change the subject of negotiation, as to make it the evidence of a debt in the hands of an assignee, when in truth, no debt exists. If it were originally void, the assignment cannot give it validity.

The case of *Turton and Benson*, 1 P. Will. 497, is conclusive upon this point to prove, that the equity which was originally attached to the bond, follows it into the hands of an assignee, with, or without notice.

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Picket and Morris, was first argued, and one of the points discussed in that cause involving the only question in *Norton and Rose*, the latter was brought on, before a decision was given in the former.

The ground upon which this court relieves is, that the plaintiff, ought not in equity to recover, because no debt was due. The assignment can only transfer the right of the obligee, and will not create a right.

Thus the question stands upon general principles; but 2dly, upon the just construction of the act of 1748, Ch. 27, § 7, there is less room for maintaining a contrary opinion. The law after authorising the assignment of bonds, and permitting the assignee to sue in his own name, provides, "that in any suit upon such bond, bill, or note, so assigned, the plaintiff shall allow all discounts that the defendant can prove, either against the plaintiff himself, or against the first obligee, before notice of such assignment was given to the defendant."

The act makes no distinction, between legal and equitable discounts. The word *discount*, is much broader than *payment*, and was intended to let in the obligor to any defence against the assignee, which he might have set up against the obligee. Would it not be strange, that the obligor should be protected against the assignee, as to *partial payments* made to the obligee, and yet, that he should be left exposed to his entire demand, where in equity no part of the bond was due? As to discounts, the assignee buys at his peril, and consequently, it becomes his duty to be satisfied upon that subject, before he concludes the negociation. At the same time, and with equal convenience he may, and ought to know from the obligor, if he hath any, and what objections to the payment of the bond. This observation is intended to anticipate the argument of inconvenience, which may probably be insisted upon, and to shew, that bonds were not considered by the legislature in the same light with those negotiable papers, which on account of their use in mercantile transactions, are rendered as current as possible, and are on that account, subject to different rules. There is a wide distinction between bills of exchange and bonds; the former are drawn for the transmission of money from one country to another; they pass through many hands, and if every person who became an assignee, were under a necessity of applying to the drawer and indorsers to know whether they had objections to paying the bill, it would stop their circulation altogether. It is on this account, that an equity originally attached to a bill, does not follow it into the hands of an assignee without notice. On the other hand, bonds seldom circulate out of the neighborhood in which they were created; they scarcely ever travel into foreign countries, and there is therefore little or no inconvenience,

ence, in gaining all necessary information respecting them, from the person who is to pay. Whoever therefore takes a bond without enquiry, takes it upon the faith of the assignor, and if he be deceived, he must suffer in the mean time for his misplaced confidence, and seek for reparation from the person who had deceived him.

WASHINGTON for the appellee. I shall make two points; 1st, That the appellant has not established an equity of any sort, against *Anderson*. 2dly, if he had, that that equity would not follow the bond into the hands of an assignee, for valuable consideration, and without notice.

The first point depends upon the evidence which is contained in the record. The bill states, that the appellant was entitled to a proportion of the sales of certain goods, which were put into the hands of *Charles Harris*, by *Anderson*. The proof is complete as to the delivery of the goods, and the amount for which they were sold; but there is no evidence, that the appellant had any interest in them, and consequently, this important fact rests altogether upon the allegations in the bill.

As to the order upon *Nicholas*, it is exposed to the same observation; there is no evidence respecting it, and if there were, the appellant by his own shewing could set up no equity on that account: for he admits, that it was neither accepted, nor paid by the drawee, and that he had no funds in his hands belonging to the drawer. So that notice of the refusal, or the return of the order was immaterial to the appellant.

The second point is new in this court, and of great importance to this country, in whatever manner it may be decided. It is admitted, that in the case of bills of exchange, the indorsee is not chargeable with any original equity attached to the bill. It is equally indisputable, that this principle applies to all negotiable papers in *England*; and the law of this state, which makes bonds assignable, brings them within the reason and influence of the same principle. The application of this rule to bonds, is to be defended, 1st, upon the policy of the thing, and 2dly, upon long established maxims which prevail in this court.

As to the first, it is not difficult to foresee, that if the assignee of a bond must take it subject to any concealed equity which may be attached to it, the negotiability of such papers, would be at an end. The design of the legislature, in making bonds assignable, was to create a kind of circulating medium, in order to supply the want of real money, and to accommodate the
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planters of this country. But if it be necessary for the person who is about to purchase a bond, to go from one part of the state to the other, in search of the obligor, in order to obtain information concerning its validity, he would rather relinquish it altogether.

As to the principle itself, it is interwoven with the best established maxims which prevail in courts of equity. The assignee of a negotiable paper, acquires a *legal* right to the money, of which the paper is the evidence; of course, *he has the law in his favor*. The obligor, may oppose the demand, by *the equity* which was originally attached to it. But the assignee being a purchaser for valuable consideration, and without notice, has *at least* as much equity to receive, as the obligor or drawer has to withhold payment. The equity then being equal, the law must prevail, nay, so far does this principle go, that in contests of a *merely equitable nature*, if either has obtained an advantage, tho' not a legal one, the court will not deprive him of it, but will leave him to make such use of it as he can. *Brow. Ch. Rep. 301.* This court, when applied to for relief against a judgment obtained by the assignee at law, must be assured that there is *superior equity* on the side of the person asking its aid. But if the parties stand equal in point of equity, it will not interfere between them. It is admitted, that this principle applies to bills of exchange. When notes of hand were made assignable, *they* became of course subject to the same rule, not on account of commercial considerations, but because they were thereby brought within a rule of equity, which in its operation is universal. *Cunning, Bills 119.* But where the assignment transfers *no legal right*, there, if the equity be equal, he who has the *prior equity* must prevail. Upon this latter rule, the cases of *Turton and Benson*, 1 *P. Will. 496*, 10 *Mod. 450*, and *Hill and Caillovel*, 1 *Vez. 123*, were decided. The assignment of a bond, in England, can only pass an equity; the meaning of it is, that the assignee is to have all equitable advantages from it, which the assignor possessed. But if he had no equitable right to the money, he could transfer none.

Observe how the principle runs through all cases coming within it, tho' totally unconnected with commerce.

If a trustee sell land to a third person, for valuable consideration, and without notice of the trust, the purchaser is discharged from the claim of the *cestui que trust*, because he has the law in his favor, and has also equal equity. As to the inconvenience of this doctrine to the obligor, it is easily avoided; he

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may give notice of his equity in the public news-papers, or he may institute a suit against the obligee, which would be notice to the whole world, and would thereby render any subsequent assignee, a *lite pendente* purchaser.

WICKHAM. It is admitted, that *in equity*, bonds were assignable before the act of 1748; and that the equity originally attached to them, followed into the hands of an assignee. What then was the object of this law? Not to render bonds subjects of commercial negotiations, nor to make them an article of traffic. No merchant would purchase a bond, unless for usurious purposes, since they could never answer the end of transmitting money to a foreign country, as bills of exchange do. The obvious intention of making bonds assignable was, to prevent circuitry of action, and to do away the necessity of accompanying them with powers of attorney, as formerly. It enabled men more easily to settle with each other, the debts which they respectively owed. A, being indebted to B, and C, to A, the assignment of C's bond, prevents the necessity of more than one suit.

But what I principally rely upon is, that the act of Assembly, by allowing the obligor to avail himself of all just discounts against the obligee, as well as the assignee, before notice of the assignment, forms a most decided difference between the case of bonds, and bills of exchange. In the first place, it affords a complete answer to the inconvenience which is so much relied upon by the counsel for the appellee, if the assignee should be compelled to make enquiry before he receives it, and which it is supposed, would tend to prevent their negociability altogether. For since every shilling of the bond may have been paid, if the assignment be accepted without enquiry, as to that point, the assignee must suffer for his neglect. The statute therefore, imposes it as a duty upon him, to make the enquiry, let the inconvenience be what it may; or if he do not, he acts at his peril. What is to prevent him from extending his enquiries to other circumstances, respecting the validity of the bond? When it is considered, that this very law, speaks also of bills of exchange, without making similar provision as to discounts, I cannot fail to deduce this principle from it; that the legislature considered the two cases as entirely dissimilar, and by making bonds assignable, they did not thereby intend to regulate their negociability, by rules, which by the law of merchants were applicable to bills of exchange. It is fair to contend, that if the case of an original objection to the bond, be not within the

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the letter of this law, which permits discounts to be claimed, it is within the spirit and equity of the provision. If the obligor be suffered to defeat the assignee of a part of his claim, by proving that so much hath been discharged, what should prevent him from a similar advantage, if instead of its having been discharged, it had never been justly due? It is not an unusual thing, to consider cases which are not strictly within the letter of a statute, to be within the equity of it. Thus the act of limitations, does not literally apply to an *equitable demand*, since it speaks only of *actions known in courts of law*; yet the court of Chancery has adopted the statute by analogy, because suits in that court, are equally within the equity of the statute. If no good reason can be assigned, for distinguishing between legal, and equitable discounts, can it be supposed, that the legislature intended a distinction?

As to bills of exchange, they are in every respect different from bonds, and the principle which is contended for as applicable to them, may be supported by strong reasons. They are always remitted to foreign countries; they there pass through many hands, and answer all the purposes of actual money. To subject them to legal, or to equitable discounts, would defeat their use entirely, and of course, they are protected, by the law of merchants, from all objections on the part of the drawer and indorsers, whether they be such, as were originally attached to them, or such, as might afterwards have arisen. The reason, that notes in *England* are considered as being within the same principle, is, that the words of the statute of *Ann*, strongly assimilate them to bills of exchange. But above all, there is no provision in that statute, similar to that, which so evidently distinguishes the case of bonds from bills by our law, and which prevents a *construction*, which could tend to assimilate them to each other.

It is attempted to remedy the inconvenience which the obligor must labor under, if the principle contended for be correct, by saying, that he may give notice of his equity in the public news-papers.

But surely, this would seldom better the situation of purchasers, it would seldom afford actual notice to any person, and it would certainly never be considered as implied notice.

The rule that where equity is equal, he who has the law in his favor must prevail, is in general correct, but in this case, it is inapplicable. The equity is not equal, because it being the duty of the assignee to inform himself, whether the bond

be justly due, before he throws away his money, he can never be permitted to found an equity upon his own negligence. If he might have had notice, and ought to have sought it, he is as culpable as if he had actually obtained it. As to *Norton*, the same charge is not imputable to him. It is necessary that there should be confidence between man and man. He was himself deceived by *Anderson*, and was of course a stranger to the injustice which had been done him. I admit, that if a trustee sell land without notice to a stranger, the rule is as it has been stated. But if on the face of the deed, or from other circumstances, the purchaser might have ground to suspect that a trust existed, he would be chargeable with the equity of the *cestui que trust*, on account of his neglect. The case of assignees of a bankrupt, is more analogous to this, than any which the opposite counsel has cited. The legal estate is vested in them by the assignment; they may bring suits in their own names, and being generally, if not always creditors, they are assignees for valuable consideration. Yet it will not be questioned, but that a debtor who has an equity against the bankrupt, may set it up against the assignees.

RANDOLPH on the same side. I will not bottom the arguments which I shall use, upon the policy or convenience of extending, or of limiting the negociability of bonds; but at the same time, it will not be improper that this should be considered. We see that, whilst in Great Britain notes of hand are made negociable, it is not deemed a wise measure to render bonds so. The former were introduced for the purposes of internal commerce, and having been preceded by *Goldsmith's* notes, which circulated like bills of exchange, it was thought wise to place notes of hand upon the same footing, and to assimilate them to the two former. But can it be supposed, that at the time when bonds were made assignable in this country, it was intended to increase the circulation of paper credit? The very reverse was the policy which governed that country, to whom we owed the liberty of passing laws. In the year 1705, notes of hand in *England*, assumed, by legislative authority, the high ground upon which they now stand. Yet the Assembly of *Virginia*, with that law before them, did not think proper to exalt bonds to the same station. And yet this law of our own country, will answer all the beneficial purposes for which it was made, although our construction of it should be found to be accurate.

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If the equity be subsequent in time to the creation of the bond, it is admitted, that it attaches itself to it, and accompanies the bond into the hands of an assignee. Suppose it to be coeval with the bond; the English cases prove that the same consequences follow: Suppose A gives his bond to B, and B gives a like bond to A: though A shall assign the bond of B to a third person, yet would it be contended, that B might not offer A's bond as a discount, notwithstanding it was coeval with his?

The legislature of 1786 revise this subject, and pass a law similar to that of 1748; they still hold out protection to the obligor, against all just discounts which he can establish against the obligee, as well as against the assignee, and they again subject the latter, to the necessity of enquiring into the nature of the debt which he is about to purchase. With a full knowledge, that bills of exchange were exempt from this clog, no disposition to assimilate the one to the other is to be discovered. Could language have expressed, more decidedly, the legislative construction of the former law, and their present determination to distinguish these negotiable papers, from each other? They say, that the assignment of bonds, notes &c. *shall be valid*; meaning, that the assignee shall thereby gain a legal right to sue in his own name: and this was the sole object of the former, as well as of the latter law.

But it is particularly worthy of observation, that though notes of hand, according to the statute of *Ann*, were placed upon the same ground with bills of exchange, and of course governed by the same rules, that the legislature of 1748, by assimilating them in every respect to bonds, rendered them unlike to bills of exchange in this country, and thereby gave a convincing proof, that it was not their intention, to suffer bonds to be governed by those rules, which applied to bills. And after such proofs of the legislative mind, can the court by any principle of sound construction, suffer a case, which is so evidently within the spirit and meaning of the law, to be without the operation of it; or permit the obligor, to avail himself of a discount against part of the debt, and yet leave him unprotected, if he set up a well founded objection to the whole.

It may not be improper in me to mention, that a similar question with this has been determined by the supreme court of *Pennsylvania*, upon a law of that state, similar to the statute of *Ann*, by which notes of hand were made assignable; but the strong words in that statute, "like to bills of exchange" were omitted

ted in the act of the *Pennsylvania* legislature; the court determined, that the assignee of a note was chargeable with the equity originally attached to it. *Dall. Rep.* 23.

This case, though not authority here, still deserves our respect, as being the decision of the supreme court of a sister state, and as shewing the opinions entertained in other parts of the union, respecting the former policy of this country, upon the subject of negotiable papers.

If we ask, what have been the British decisions upon this subject, in cases of bonds, it is agreed on all hands, that the situation of the assignee is in no respect better than that of the obligee. *Turton and Benson*, is an express authority, that the assignee is considered as standing in the shoes of the obligee, because, say the judges, it is his fault; if he do not enquire into the validity of the bond, and the nature of the debt, before he takes the assignment.

But it is insisted that the principle of that case is inapplicable to the present, because the assignment of a bond in *England*, does not transfer a *legal right* to the money. It is obvious, that the distinction is not a sound one, for since by the rules of equity in that country, and by the laws of this, the assignee is expected to enquire into the nature of the debt before he obtains an assignment: his negligence in not making that enquiry forbids him in either case to say, that he has *equal equity* with the obligor. Of course, the assignee's *legal right* will not avail him, since by his negligence he has deprived himself of that equity, which would have counterbalanced the equity of the obligor.

If this case be considered upon principle, independent of authority, nothing can be more clear, than that the rule laid down in *Turton and Benson*, is bottomed upon the soundest reason. For what could be more absurd or unjust, than that a bond, however fraudulently obtained, should acquire a binding quality by passing into the hands of an assignee, when, at the moment of the assignment, it was invalid or ineffectual? Even in the case of a bill of exchange, (the peculiar favorite of British courts,) if it be drawn for a gaming, or usurious consideration, it is void, as well in the hands of an indorsee, as in those of the original payee. And altho' in other instances, where the same principle of justice prevails, it is compelled to yield to reasons of policy founded in commercial considerations, yet, where those reasons do not apply, the principle can never be done away. If bonds be not essential to commercial negotiations, as they

they certainly are not, there can be no reason for applying the same rules to them which prevail in cases of bills of exchange; and if so, why should a bond which has been paid off, which was obtained by duress, or fraud, be more binding in the hands of the assignee, than it was previous to the assignment? In every point of view it seems clear, that not only English decisions, but the municipal regulations of our own country, favor the doctrine, that an original or subsequent equity against a bond, follows it into the hands of an assignee.

WASHINGTON in reply. The principle, that where equity is equal, he who has gained a legal advantage must prevail, is admitted. But it is denied to be applicable for two reasons:

1st, That the assignee has not equal equity:

2d, That under the equity of the act of Assembly, the rule is in this case to be rejected.

1st, The assignee it is said has not equal equity, because he is guilty of culpable negligence, in not enquiring of the obligor before he takes the assignment, into the nature of the debt. This however is a *petitio principii*. That he is obliged to make the enquiry is proved by no case, except that of *Turton* and *Benson*, which can only apply, where, by the assignment, a merely equitable right passes. In such a case, the assignor can only dispose of a naked equity, and of course, the assignee can acquire no greater interest. If the former has not equitable interest in him, he can dispose of none. The *posterior* equity of the assignee, unsupported by a legal right, cannot prevail against the *prior* and *equal* equity of the obligor. It is this, and not the neglect of the assignee which defeats his equity: in a case of that sort, the principle of *caveat emptor* applies in its full force.

But why is not the indorsee of a bill of exchange obliged to enquire? The answer is, that for the sake of commerce, the law of merchants does not require it.

I must allow the entire credit of this reason to the counsel, since there is no case in which it is assigned as the cause of the decision. But if it were, it will apply with almost equal force to bonds. Though bills are used for the purposes of remittance, and are therefore paid in foreign countries, yet they are drawn, and generally endorsed in this country; so that, it will be as easy to enquire, of the drawer in the one case, as of the obligor in the other, into the circumstances of the debt. But why should inland bills, and notes of hand be governed by the same rule of

law,

law, when it must be admitted, that the reason assigned as to foreign bills, cannot apply to these cases, more than to bonds?

It was observed by one of the court, that the reason for applying the rule I contend for to the case of bills of exchange, might be, that every indorser is considered as a new drawer; consequently, a new contract arises which might discharge the pre-existing equity. With submission, I cannot think that this will furnish a sufficient reason. If the *indorser* claimed an equity, it might be so; but surely, his assignment could not discharge the prior equity of the *drawer*, merely because that assignment created a new contract on the part of the indorser. The indorser is so far a new drawer, that he obliges himself to pay the amount of the bill, in case the drawee do not. But the *drawer* is not privy to this latter contract, and cannot therefore lose his prior rights, because the *indorsee* has gained a new security. I should rather suppose, that if this consideration could have any influence, the indorsee, having obtained additional security, will have less reason for defeating the equity of the drawer.

But why does the principle I am attempting to maintain, extend to other cases, than the transfer of *choses* in action? For example, an absolute conveyance by a trustee, to a third person, without notice; a sale by a mortgagee, having an absolute conveyance, though in fact intended only as a security for money, to a stranger, without notice; a conveyance by the vendee of land, where the vendor has a *lien* upon it, for the consideration money; in these cases, the equitable rights of the *cestui qui trust*, mortgagor, and vendor, are defeated, and yet the purchaser, might have enquired, particularly in the two latter cases, of the mortgagor and vendor, if they had any equitable claims to the land. But this is not necessary; and yet in all those cases the grantee takes the land discharged of the equity, because, having acquired a legal title, and being a purchaser for valuable consideration and without notice, he must prevail.

For what reason should the enquiry be made? The bond upon the face of it furnishes no cause for suspicion; the obligor could but confirm by parol declarations, what he had before solemnly acknowledged under his hand and seal. Suppose the enquiry in this case had been made, and *Norton*, had made parol declarations; similar to those expressed in the bond, he being still under the deception which his counsel impute to him: could he set up an after-discovered equity? If he could, then

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the enquiry would be unavailing to the assignee; if otherwise, then, the obligor could not be benefited by it. The equity which the obligor may have, is always coeval with, or posterior to the bond. If coeval with it, it is either then, or afterwards known to the obligor; if then known, it is a fraud upon the public to send into circulation a negociable paper, which may deceive others, and therefore, every principle of equity is stifled by the fraud: if not *known*, but *suspected*, the case is the same; for then, the bond should express what is suspected, that third persons may not be imposed upon. In this case, Mr. Norton states in his bill, that he knew of the credit, now made the ground work of his application for relief in equity, and insisted upon its being allowed; but that he was deceived by *Anderson*, into a belief, that he was not entitled to it. Why then did he not reserve the right of claiming this credit, in case he should afterwards discover that he was entitled to it, and by a memorandum on the bond, give notice to the world, of this latent equity? The charge of neglect therefore, is returned upon Mr. Norton's hands, and his counsel very well know the influence it will have in defeating an equity. If the equity be neither known, nor suspected at the time the bond is given, then the principle which applies in all contests *de damno evitando*, must be resorted to: it is, that wherever one of two innocent persons must suffer, by the act of a third, he who hath enabled such third person to occasion the loss, must sustain it. *Lickbarrow vs Mason*, 2 Durnf. and East 63. As soon as the equity is discovered, the obligor should immediately give notice of it; this may easily be done in the public prints, or by suit. *Amb. Rep.* 66. But the answer to this remedy is, that the bond may have been previously assigned, if so, then the enquiry would not have bettered the situation of the assignee, or of the obligor; for the latter, must then have acknowledged, what he had before done with more solemnity, that he knew of no equity against the bond: If not previously assigned, then the notice would prevent its transfer.

On the other hand, the trouble and inconvenience of making the enquiry, and the difficulty of proving the re-acknowledgment, would put a stop to the negociability of bonds, & would entirely defeat the intention of the law which made them assignable.

It is contended, that it is essential, that the parties to a bond should have confidence in each other. Be it so; but let it also be conceded, that he who places the confidence, should take the consequences of having misplaced it, and not seek to throw it

it upon a third person, who was not privy to the transaction. In commercial matters, confidence is peculiarly necessary; and yet this court determined in the case of *Hoe and Harrison vs Oxley and Hancock*, (*ante vol. 1, p. 19,*) that if an agent, who is authorized to draw bills for special purposes, abuses the trust, and misapplies the money, the principal who gave the confidence must suffer.

It is said, that the statute of *Ann*, assimilates notes, to bills, by the expressions it uses. It declares, that they *may be assigned like bills*, but it does not assimilate them in any of their consequences, or collateral points.

It is then contended. 2dly, That this case is within the equity of the act of Assembly, which, it is said, essentially distinguishes it from the cases which have been cited respecting bills, notes &c.

There is an apparent inconsistency in the arguments respecting this law. It is obstinately insisted upon, that the equity originally attached to a bond, would follow it into the hands of an assignee, upon principles unaffected by this law; if so why was this law made?

The legislature, when engaged in the business of altering a general principle of law, are not to be supposed ignorant of the full extent of that principle. If without legislative interference the obligor could not have protected himself against an assignee even for *actual payments* made before notice of the assignment, (and that he could not, was evidently the sense of the legislature, otherwise their interference was unnecessary,) much less could he set up an original, and concealed equity; for the former case, an express provision is made. There is no ambiguity in the language of the proviso, nor is it even contended, that the case of an original equity comes strictly within it. But it is contended to be with the spirit of the proviso. There are cases, I admit where it is justifiable to take liberties of this sort, with the words which the legislature uses: but there should be an apparent necessity for it, and I hold it to be always unwarrantable, if a reason for excluding the case which is sought to be constructively included, can be assigned. A little reflection, will furnish, a satisfactory reason for the discrimination, between posterior discounts, and original equity.

In the first, the obligor has done what by the terms of his contract he had stipulated to perform. He has made partial payments, or has entirely discharged the debt; it was his duty to do this; and therefore, he who is about to purchase, ought to

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suppose that to have been done, which the contract stipulated to be done; here, there is a cause of suspicion growing out of the instrument itself, strong enough to prompt an enquiry, and if the assignee be hardy enough to calculate against this reasonable presumption in consequence of the confidence he may repose in the obligor, it is perhaps not improper to leave him to his recourse against the person who has deceived him.

But it is far otherwise with respect to an original equity. To presume that the debt was never due, would be to form a conclusion against the words of the contract itself, which import the contrary. The obligor has declared the debt to be due, and that he will pay. This solemn acknowledgment of its justice, he has confirmed with his signature and seal. If it were not due, he would not, and certainly ought not to have obliged himself to pay it, and that too in a manner calculated to deceive those who trust in this declaration. It is not enough to say that he was ignorant of the objections to the claim at the time he gave the bond, or was imposed upon by the obligee; it was his duty to investigate the subject, before he sent forth a negotiable paper, which in every change it underwent, possessed the power of deceiving, and of injuring fair purchasers. In this case, the assignee could have no cause to suspect an original equity contrary to the express letter of the contract. To enquire of the obligor, if he meant the reverse of what he has declared, would be an absurdity, which the legislature could never mean to require of the assignee. The difference between discounts, and an original equity, is this; in the first, the assignee purchases upon the faith of the *obligee*, since nothing but his assurances could repel the natural conclusion, that payment had been made; in the latter, he purchases upon the faith of the *obligor*, that the debt was due when the bond was executed, because he has said so, and that in the most solemn manner.

The legislature therefore, were influenced by the strongest motives to make the discrimination.

If the legislature state a particular case, and might by apt language have expressed themselves *generally*, if they had meant to do so, it is too much like legislating, for the court to make a construction broader than the words which are used will warrant.

If an original equity had been intended, the proviso would have permitted the obligor, "to make any defence in law or equity, which he might have made, in case no assignment had been made," and it is contended, that the court should construe the word *discount*, so as to mean the same thing. It

It is said, that the act of limitations, though it does not extend to the courts of equity in express terms, is nevertheless adopted by analogy. This is true; and I do not object to courts of equity permitting the obligor, to avail himself of discounts against the assignee, in the same manner, as he might at law; what I contend is, that neither courts of law, nor of equity, can *extend* the construction of the proviso, beyond the fair meaning of it. The act of limitations is *restricted*, or rather *disregarded* in equity in many cases; but it is never *extended beyond the periods prescribed by the law*.

No two cases can be more unlike, than this, and the case of assignees of a bankrupt; in the latter case, the assignees are merely *trustees*, and are no more entitled to avoid an equity against the bankrupt, than the bankrupt himself would have been.

ROANE, J.—There are some points in this cause, which are not controverted by either side. It is admitted, that upon the principles of the common law, a *chose* in action is not assignable; that is, the assignment does not give to the assignee, a right to maintain an action in his own name.

It is also conceded, that in *England*, the assignee of a bond, takes it charged with every species of equity, which was attached to it in the hands of the obligee. If a different principle prevail in this country, it must grow out of the acts of Assembly, which authorised the assignment of bonds. The acts of 1730, and 1748, upon this subject, are precisely the same as to the present question. I should have been glad to have seen the act of 1705, but I have not been able to meet with it. This case, depends upon the just construction of the act of 1748. The intention of it, was to alter the common law, so far as it prevented bonds from being assigned, and to give to the assignee, a right to sue in his own name, in the same manner, as the obligee might have done.

It was not intended to abridge the rights of the obligor, or to enlarge those of the assignee, beyond that of suing in his own name; and since it is clear, that prior to this law, an original equity attached to the bond, followed it into the hands of the assignee, this law, does not expressly, nor by implication, destroy that principle. Notes of hand are now assignable in *England*, and it is admitted, that the assignee is discharged of any equity, which existed against the assignor, unless the note was given for an usurious, or for a gaming consideration.

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The reason of this, is not that the principle attached to them is a legal consequence of their being made assignable, but because this rule for commercial purposes, applied to bills of exchange; and the statute of *Ann*, declaring notes assignable, in like manner as bills of exchange, shewed an intention, as it was supposed, to render the former, as highly negociable, and as current in internal, as the latter was in external commerce. The act of our Assembly, embraces equally the subject of bonds and notes, but contains no expressions tending to induce a belief, that the making them assignable, was intended for purposes of commerce. The design certainly was, to make them transferable to a certain extent; the provision points out the limits of their negociability, and fixes a strong mark of distinction between them, and bills of exchange. As to the latter, they were always assignable, and the indorsement transferred a legal right to the indorsee. They did not owe this quality to statutory provisions, and of course, they continued within that principle which had attached to them, and of which they were not deprived by any statute.

Lord Mansfield lays it down in the case of *Peacock vs Rhodes*, Dougl. 636, "that the holder of a bill of exchange, or promissory note, is not to be considered in the light of an assignee of the payee. An assignee must take the thing assigned, subject to all the equity to which the original party was subject: if this rule applied to bills and promissory notes, it would stop their currency." So in *Cunningham's laws of bills of exchange*, p. 65, the Chancellor refused to relieve against the assignee of a bill, "because it would tend to destroy trade, which is carried on every where by bills of exchange, and he would not lessen an honest creditor's security." And we are informed by *Domat*, 131, Tit. 16, § 4, p. 231, that the covenant which passes between the person who gives the money, and him who undertakes to remit it to another place, hath in it some particular characters which distinguish it from other kinds of covenants, that seem to have some resemblance with it.

It is therefore, not because the indorsee is an assignee of the legal right to such bills and promissory notes, that the equity is barred by the indorsement, but because of their quality as a currency, and from the necessity of adopting such a principle, for the convenience of trade and commerce with respect to such currency. But bonds, are not to be considered as a currency, and within the reason of the principle laid down in *Peacock and Rhodes*; for that principle is founded upon commercial con-

derations altogether, and not upon a distinction between *legal*, and *equitable* assignments.

With respect to the proviso in the act of 1748, it contemplates *legal discounts* only. The words, "the plaintiff shall allow *all discounts* which the defendant can prove," were meant to extend those discounts beyond the credits which might be endorsed on the bond; and the latter words, "before notice of such assignment was given to the defendant," were meant to restrain the discounts to such as existed prior to notice of the assignment. This enlarging and restraining proviso was necessary, in order to express clearly the meaning of the legislature; but neither the proviso, nor any other part of this act, was intended to *extend* to, or to *abridge equitable discounts*, which were not in the contemplation of the legislature who made this law.

The inconvenience, which it is apprehended will result from rejecting the application of the principle contended for, is certainly not real, or if it be, it was not so considered by the legislature. The assignee, it is admitted, takes the bond at his peril, so far at least, as the possible claim of the obligor to discounts may extend. If he chuse not to encounter this risk, or to repose entire confidence in the obligee, he must enquire of the obligor, and from him obtain information, respecting (at least) this part of the subject. With the same convenience, may the enquiry extend to any equitable objections attached to the bond. The two cases are precisely within the same reason, and I can discover no principle of policy or justice, which should so widely distinguish them. The assignee of a note given by an infant, feme covert, or for a gaming, or usurious consideration, does not take it discharged of those objections, but the contrary. In those cases, as well as in respect of discounts, he must take care what he purchases; he acts at his peril, and must therefore act with caution. For what reason then, shall an equity, originally incorporated with the bond, and which should destroy its obligation, be discharged in the hands of an assignee? The provision of this act has long governed the assignment of bonds, and it is but of late years that the existence of such a principle as has been contended for in this cause, has been thought of, as applicable to bonds and notes. This consideration, though it would not direct, has much weight in confirming the opinion which I clearly entertain upon this subject. The appellee may suffer in consequence of it; but this is preferable to the establishment of a principle, which may produce great public mischief, and injustice.

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Although I am clear in the opinion, that an equity existing against a bond, is not lost or extinguished by an assignment for valuable consideration and without notice, yet it may be lost by length of time or other circumstances. In this case however it does not appear, *when* the deception practised by *Anderson* was found out by *Norton*, or that *Norton* delayed an unreasonable length of time, in coming forward to assert his equity. It is true, that his interest in the goods sold by *Harris* is not established in the proof, but the ground of the Chancellor's decree, being wrong, it must be reversed, and the cause remanded for further proceedings, so as to let in Mr. *Norton* to the proof of his equity. The decree so far as it respects the order on *Nicholas*, with reference to the present appellee, I think is right.

CARRINGTON, J.—To consider this case upon general principles; the question is, whether an equity, originally attached to a bond, follows it into the hands of an assignee without notice. In *England*, notes of hand were not assignable, until the 3d and 4th of *Queen Ann*, so as to enable the assignee to bring a suit at law in his own name. Courts of Equity were of course resorted to, where the maker of the note was not precluded from setting up any equitable defence, which he might have. Frequent attempts were made by the bankers and traders, to bring them within the custom of merchants, and to place them upon the same footing of negociability with bills of exchange. But the judges still considered them merely as evidences of debt. At length, the statute was procured, conformably with the wishes of the trading part of the community, making them assignable, *in like manner as bills of exchange*. The likeness thus strongly sanctioned by legislative authority, produced similar decisions in cases, where their negociability were concerned.

But no efforts were made in favor of bonds, and they remain in the same situation *in England*, as they stood at common law.

This country was then a part of the British empire, and our legislature, assimilated its laws, to those of the mother country, so far, as our local situation and state of society authorised it. In 1705, shortly after the English statute passed respecting notes of hand, the Assembly, passed a law, authorising the assignment of bonds and notes. This law, I cannot meet with, but it was repealed by proclamation in 1730, and in the same year, another law was enacted, exactly similar to the act of

1748. With the English statute before their eyes, the legislature did not chuse to adopt it altogether, or to introduce into it a principle, which should defeat the equity of the obligor, as it was secured to him at common law. Those expressions in the statute, which assimilated notes to bills of exchange, were omitted in our law, and in the room of them, others were introduced, which established an opposing principle. The negociability of bonds and notes, was qualified and restricted within bounds, consistent with the commercial station of this country. There was no necessity for exalting those kinds of paper to the high ground, on which the commercial world had placed bills of exchange, and the whole complexion of the law shews, that it was intended to be avoided. The doctrine which has been stated and relied upon, as applicable to foreign bills of exchange, is consequently inapplicable to the present discussion. These considerations have produced conclusions in the public mind, as to the construction of the law in question, the very reverse of what has been contended for by the counsel for the appellee. I should be unwilling to unsettle these long formed opinions, unless the expressions of the law rendered it absolutely necessary.

That a bond fraudulent and void in its creation, cannot be cleansed of its impurity, and rendered valid by assignment is settled by the case of *Turton and Benson* and has uniformly been so decided in the courts of this country. No man can by the mere act of assignment transfer a greater interest than he holds; dispose of an interest where he has nothing, or make good and valid, that which was originally vicious and void. In this enlightened age though former decisions are rejected, and a new mode of attaining justice is discovered. But is it true, that the means are adequate to the object? It is urged as a reason for the rejection of former opinions upon this subject, that they tended to impose deceptions upon the public, and to cramp commerce, by destroying the negociability of bonds and notes. As it strikes me, they rather tend to prevent, than to countenance those frauds, and if the other consequences will follow, it is preferable to sacrificing a majority of the public, to the avarice and injustice of a few. But I cannot perceive, how commerce, or that sort of it which is most useful to society can be injured. That their negociability will be restrained I admit, but they will answer the purposes for which the law intended them, by facilitating the collection of debts and thereby affording a convenient, and desirable accommodation to the people of this country.

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The case now under consideration, comes fully within those principles which seem to me correct. *Norton* and *Anderson* were concerned together in trade, and upon a settlement of accounts, *Norton* claimed a credit for the proceeds of a quantity of goods in the hands of *Harris*. But *Harris* assuring him that he had received no part of those proceeds, *Norton*, unsuspecting of the truth, gave his bond for the balance as it stood. *Rose*, it is admitted, was a fair, *bona fide* purchaser of the bond. He is chargeable only with neglect; he might and ought to have satisfied himself, that the debt was justly due before he received it. If upon an enquiry, *Norton* had assented to the payment, or acknowledged he had no objections to it, this would have deprived him of his equity against *Rose*. It was easy for any person wishing to take an assignment of the bond, to make the enquiry; they would know at once, where to make the application. On the other hand, *Norton* could not give a special notice to the person who was about to obtain it and the public papers would afford a very uncertain channel of information.

Upon the whole I am clear that the decree is erroneous and ought to be reversed.

LYONS, J.—This has been truly said, to be a cause of considerable importance, on account of the precedent to be established. In order to discover the legislative intention, when the act of 1730 (of which that of 1748 is an exact copy, as to this question,) was passed and to comprehend more clearly the consequences of the construction contended for by the appellee, I shall consider this case as if it had been to be decided upon at that time. If *Norton* had given this bond before assignments were sanctioned by legislative authority, it is admitted on all hands, that his equity would have followed the bond, into the hands of an assignee. If so, is it possible that the legislature could have meditated so much injustice, as to exclude him from setting up an objection to the debt, which but for the law, he might have made? Could it mean to protect fraud, and to give validity to an instrument, which was originally void and founded in deception? Whatever would then have been the construction of the law, must be the construction of it at this day. I mention this to shew that the legislature by making bonds assignable, did not thereby mean to deprive the obligors of any equitable objections, which they might have to them. Until this act passed, bonds were not assignable. Bills of exchange could not answer the purposes of internal negociation, between

between the planters and the merchants; the former from their situation, were under a necessity of having credit from the latter, and to secure this, it was deemed proper to make bonds assignable, by which means, the factors, who often took them in their own names, were enabled to pass them away in the purchase of commodities, or might, when necessary, transfer them over to their principals. This history of bonds will evince, that as there was no necessity, so it never could have been the legislative intention, to give to them all the high privileges attached to bills of exchange, and particularly that, which has been contended for by the appellee. Independent of this, the law upon the face of it, repels a construction, calculated to deprive the obligor of his equitable objections. It *saves to him the right* of opposing the claim by all *just discounts* which he can make, and consequently could not mean to *deprive* him of an equity, strong enough to invalidate the whole claim. The law, so far from being designed to grant favors to the *assignee*, is calculated to protect the *obligor*; the former, is obliged to admit all discounts against the obligee, and at his peril to give notice of the assignment, under the penalty of being bound by payments made, after the obligee has parted with his right to receive them.

The accuracy of the principle laid down by the appellee's counsel is not questioned; its application to this case is. For since it is admitted, that if the law had not permitted the assignment of bonds, an equity existing against the obligee would have accompanied the bond into the hands of an assignee, the single enquiry which remains is, does the law take away this right, previously possessed by the obligor? I have endeavored to shew, that so far from doing this, the law itself displays a careful attention to the rights and interest of the obligor.

The arguments which were used to assimilate this, to the case of a bill of exchange and promissory note, are totally without foundation. The reason of the law as applicable to those cases, is not founded upon the principle stated by the counsel for the appellee, but upon considerations altogether of a commercial nature.

Upon the whole, I concur in opinion with the other judges.

The opinion and decree of the court, was entered as follows:
 "The COURT is of opinion, that an assignee of a bond or
 "obligation, takes the same, subject to all the equity of the o-
 "bligor, and that the appellant ought to be allowed to set off
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"and discount against the debt claimed by the appellee as assignee of *George Anderson*, the other defendant in the decree named, any equitable demand respecting the said debt, which he had a right to claim from the said *George Anderson*, the original obligee." Decree reversed with costs, and the cause remanded to the High Court of Chancery for further proceedings to be had therein, according to the principles of this decree.

PICKET,

against

MORRIS.

IN the year 1785, *Morris*, purchased from *Littlepage*, the moiety of two thousand acres of land in *Kentucky*, at the prices of £ 600, and gave his bond for £ 400, payable at a future day, and a note of hand for £ 200, which has been discharged. *Johnson*; had an equitable title to the other moiety of this land, under a former contract, but upon this condition, that he should allow *Littlepage*, or those claiming under him, to take choice of either of the two tracts on paying the difference in value between them. In 1786, *Littlepage*, assigned this bond to *Stockdell*, at which time, *Morris*, was a creditor of *Stockdell* by bond, in a sum, very little short of the amount of the one which he had given to *Littlepage*. *Stockdell*, proposed a discount of the two bonds to *Morris*, which the latter refused, in consequence of the pendency of a suit against him, *Littlepage* and others, by *Johnson*, in the state of *Kentucky*, claiming a conveyance of an undivided moiety of the 2000 acres of land, instead of a separate tract, with the difference in value between such tract, and the first choice which *Morris*, by his contract with *Littlepage* had a right to make. After this refusal, *Morris* instituted suit against *Stockdell* upon his bond, and recovered a judgment. *Stockdell*, assigned *Morris's* bond to *Picket*, but whether before, or after the judgment obtained by *Morris*, does not certainly appear.

Picket, instituted a suit upon this bond against *Morris*, in the County Court of *Henrico*. At the trial of that cause, the counsel of *Morris* offered *Stockdell's* bond as a discount, and moved the

the court to instruct the jury upon the law arising from the facts in evidence before them, or by other means to reserve the points for their future decision, and for this purpose, tendered a statement of the facts, requesting the court to alter them if necessary, so as to reserve the case. The court declined, or neglected giving any opinion upon either point.

The legality of the discount; the equity of *Morris* against the bond in question; and the subject of notice to *Picket* of both or either of those objections, were subjects discussed before the jury; and the court refusing to interfere, they found a verdict for *Picket*, the plaintiff at law.

The defendant *Morris*, moved for a new trial, (this being the second trial of the cause,) but the court were divided in opinion. Afterwards, a fifth magistrate, who had sat during the trial, came upon the bench, and the motion was renewed, but was soon afterwards dropt. The defendant then exhibited a bill to the same court praying for an injunction, at which time, *Picket*, agreed to stay execution for a month, that the defendant might have an opportunity of applying to the Chancellor, for an injunction, which he afterwards did.

Morris filed his bill in the High Court of Chancery, praying to be relieved against this judgment, principally upon the ground of the debt due to him from *Stockdell*, which had not been allowed him as a discount in the trial at law.

Picket, in his answer to this bill, states himself to have been a fair, *bona fide* purchaser of the bond in question, without notice of any disputes relative thereto, or of the appellee's right to any discounts. That he paid *Stockdell* for the said bond, in money certificates and other public securities, a sum exceeding the value of this bond, which excess, created a debt from *Stockdell* to him, which has been considerably encreased by other advances.

Whether the County Court refused to grant the injunction applied for by *Morris*, or whether the motion was withdrawn in consequence of the offer made by *Picket*, of staying execution for a month, does not certainly appear from the record.

One witness proves, that the appellant applied to him to know what objection the appellee had to the payment of this bond; the witness informed him that the appellee had discounts against it, and also mentioned the dispute about the *Kentucky* land: upon which the appellant replied, "that he would have nothing to do with the bond. The witness does not state whether this conversation took place before or after the assignment,

ment, but concludes from *Picket's* reply, that it was prior to it. It does not appear when the assignment was made. The High Court of Chancery, upon a hearing of the cause, dissolved the injunction as to £ 36: 13: 3, with interest thereupon from August 1786, after deducting therefrom the costs of that court, and decreed the injunction to stand and be perpetual as to the residue, and that *Morris* should assign to *Picket* the judgment obtained by him against *Stockdell*; the bill as to *Littlepage* was dismissed with costs. From this decree *Picket* appealed.

MARSHALL for the appellant. The first question which I shall consider is, whether the appellant could at law, have set up his judgment against *Stockdell*, as a discount against the appellant. 2dly, Whether he can resort to a court of equity for the relief sought for by this bill.

1st, The assignee of a bond, by the law of this state, is bound to allow all just discounts against *himself*, or against the *obligee* before notice of the assignment. The discount offered by the appellee, is a judgment obtained against a *mesne assignee*, which I contend is not a case provided for by the act of Assembly. *Morris's* bond, coming by assignment into the hands of *Stockdell*, could not be considered as being *ipso facto* discharged, in consequence of the latter being the debtor to the former to an equal amount. The reciprocal possession of each others bonds, did not amount to a payment of both, or of either. The one may be *discounted* against the other, unless the conduct of the parties hath prevented it.

This is the difference between *actual payment*, and off-setting mutual demands; in the first, the bond, is discharged by the silent operation of law; in the latter, both debts subsist, until *they are opposed* to each other; for the parties may *wave* the discount if they please.

In this case, *Morris*, evinced his determination not to discount, expressly, as well as impliedly. He refused it *expressly*, when *Stockdell* applied to him for that purpose; and impliedly, by bringing suit against *Stockdell* upon his bond, in which, if the discount had been offered, he must have been nonsuited. And *Stockdell*, by assigning *Morris's* bond to *Picket*, evinced a similar disposition in himself not to discount.

After this, will it be contended, that *Morris* can reclaim his right of discounting, and that too, against a *bona fide* assignee? But suppose *Morris*, was not deprived of this right by his own conduct, let us consider.

2dly, Whether he can be relieved in this court.

H 2

Every

Every point in this cause, has once been before a court of competent jurisdiction, and without a possible objection to the fairness of the trial, the jury have decided in favor of the appellant. If the County Court gave an erroneous opinion upon the points submitted to them, or if they erred in refusing to give any opinion at all, the power of correction belonged exclusively to an *appellate court*. But a court of equity has no jurisdiction in such a case. It cannot correct legal errors in an inferior court, or rehear and rejudge the judgment of a court of law. If *Morris* was aggrieved by the judgment of the County Court, he might have excepted and appealed. If the justices refused to sanction the bill of exceptions by their signature, the law marks out a plain redress for the injured party. But instead of pursuing those steps, the appellee voluntarily abandons them, and now seeks relief in a court of equity, upon the very points, which had been fully discussed, and fairly decided upon in a court of law. If he can hope to succeed, it must not be by asserting *the law* to be in his favor, for that has been determined against him by the proper tribunal, and therefore, the law is with his antagonist, until that decision be reversed. He must then rely altogether upon his claim to *superior equity*.

Let the pretensions of the two parties upon this ground be compared. *Picket*, is a fair purchaser, for a valuable and full consideration, without notice of any objection upon the part of *Morris*. On the other hand, *Morris*, had by his own conduct, completely discharged the bond in question from the danger of being discounted, against the debt due from *Stockdell*, to him. He refused the discount, as one of the depositions proves, for the unfair purpose of discharging his own bond in warrants, at a reduced price, and consequently for less than the real amount. He institutes suit against *Stockdell*, as an additional evidence of his having disclaimed the discount, after which, his bond is assigned. Can he now talk of equity, who by his own conduct has been the cause of the very loss, he is unwilling to bear himself, and now seeks to throw upon *Picket*? If he had done at that time, what he now insists upon, the bond in question would long since have been cancelled, and deprived of its ability to deceive the world.

Perhaps an attempt may be made to excuse this conduct of *Morris*, on account of the equity against his bond, which is faintly relied upon in the bill. If this had been any thing more than a pretence, *Morris*, instead of waving the discount by bringing suit upon *Stockdell's* bond, would have instituted a suit in

in equity to be relieved against the payment of his bond, by which means, third persons would have been warned not to purchase it. But the decree of the Chancellor, by directing the difference between the two bonds to be paid by *Morris*, necessarily disallows his claim of equity on account of the *Kentucky* lands.

I say nothing about the bill of exceptions, because not being signed, it contains no facts which this court ought to regard.

WICKHAM for the appellee. I cannot agree, that *Morris*, has by any part of his conduct waved his right of discounting *Stockdell's* bond against his own, or that he is precluded from asserting that right, as well as his prior equity against this bond, in a court of chancery.

Morris purchased from *Littlepage* his choice of two distinct tracts of land, of a thousand acres each. He is afterwards sued in the state of *Kentucky*, by *Johnson*, who claims an undivided moiety of both tracts. Should he succeed, no two contracts can be more unlike, than the one made with *Littlepage*, and that which would be thus forced upon him. The bond which he had given in part of the purchase money, comes by assignment into the hands of *Stockdell*, his debtor, charged with this equity against it, and therefore, when *Morris* was applied to by *Stockdell* to discount one bond against the other, the former, very properly objected. He was not bound to offset a debt justly due to him, against one, which in equity he did not owe. Under this impresson, *Morris* brought suit upon *Stockdell's* bond as he certainly had a right to do.

It cannot be denied, that *Morris* had originally an equity against *Littlepage*; but it was not necessary for him to disaffirm the contract, unless he pleased to do so; for if the damages to which he was entitled, should be equal to the debt due from him to *Littlepage*, the one would discharge the other, and yet the contract remain valid.

The next question then is, whether *Morris*, can in a court of chancery set up this equity, as well as the discount, against *Pickett*, the assignee. As this point has been fully discussed in the case of *Norton* and *Rose*, it will not be necessary to repeat those arguments.

But it is contended, that cross bonds do not discharge each other; that they only give an election to discount, the one against the other. This position may be very questionable. The words of the law are general enough to make any discount, a payment.

But

But if this be not the case, *Morris* may offer *Stockdell's* bond as a discount against *Picket*, because it would have been a good one against *Stockdell*. The time when the discount may be made is not limited by the law, and therefore, may properly be offered when payment is demanded. The conduct of the parties in the mean time cannot defeat this right to discount, unless it amount to an *express waiver*. I have endeavored to prove, that the refusal of *Morris*, did not amount to a waiver. On the other hand, he retains *Stockdell's* bond in his possession, and as soon as he was properly called upon by *Picket's* suit to make his election, whether to discount or not, he then offered *Stockdell's* debt as an offset. The institution of the suit upon *Stockdell's* bond, was not an implied waiver; by giving to the debt the security and dignity of a judgment, he did not thereby render it unfit to be made an offset.

But it is contended, that however the general question may be decided, a discount against a *mesne assignee* cannot be set up against the plaintiff in the action. I can see no good reason for this distinction; if it be correct, it is apparent that the most palpable injustice must follow. The obligor, knowing that his bond has come by assignment into the possession of a particular person, goes on to sell him property, or to make payments; will it be contended, that a subsequent assignment of the bond, will discharge it of those discounts which had once fairly attached upon it?

If we must give to the law a construction so strict as to produce this effect, it will follow from the same mode of interpretation, that the negotiability of a bond is at an end after one assignment, and of course, that *Picket* could not recover at law. The words of the law are, "that any person or persons may assign," which if taken strictly, will only apply to *obligee* or *obligees*. But if under a liberal construction of the law, assignees may assign, the proviso as to discounts must be so far extended in its interpretation, as to be commensurate with the right to assign.

The next question is, whether we can be assisted in a court of equity, after what has happened in the trial at law?

It is objected, that the errors which the court committed, were only examinable by a court of appellate jurisdiction. But in the case of *Ambler and Wyld*, (*ante* p. 36,) this court determined, that the Chancellor might relieve against a mere error in the court of law. In that case, the court improperly refused to admit certain testimony which was offered; the party aggrieved

grieved by that decision might have excepted and appealed, but he did not. Your honors determined, that the inferior court were wrong in refusing the evidence, and that the party who was injured by the mistake of his counsel, in not excepting, might seek relief in equity. But this is a much stronger case than that. We do not complain of an erroneous opinion given by the court, but that they refused to give any opinion at all when applied to for that purpose. Instead of instructing the jury as to the law, they left a question of nicety and difficulty to be decided upon by them. If the jury undertook to determine upon a question which involved equitable matter, and were wrong in their opinion, surely their decision does not oust the court of chancery of its jurisdiction over the subject. It is obvious, that the counsel for *Morris* were misled, and the jury confounded by an enquiry into *Morris's equity* against the bond, and *Picket's knowledge of it, before the assignment*; whereas the single point to which the attention of the jury ought to have been directed, was, the propriety of *discounting the bond due from Stockdell*, as to the *notice*, the jury had nothing to do with it; it was a merely equitable question. The defendant was prevented from obtaining a new trial, from a mere accident, which it was not in his power to controul. It is every day's practice, for the Chancellor to relieve against an injury, resulting from a mistake of counsel; as where he neglects to offer discounts, and the like.

Having, I trust established the jurisdiction of the court of equity. I will proceed to examine the facts in this cause, and apply them to the principles which I have endeavored to maintain.

If *Stockdell* had been the plaintiff at law, no question would exist as to our right to relief against him. It will also be conceded, that whether the equity goes along with the bond into the hands of an assignee, or not, he is liable, if he had notice of it before he has paid the consideration money. Nay, if he received it at a time, when it was in his power to save himself, he will be considered as a purchaser with notice.

If Mr. *Picket* can be in a better situation than *Stockdell* would have been, he must not only be a purchaser without notice, but he must prove, that he gave a *full bona fide* consideration, and that he has paid the *whole* of it.

I say, he must have paid a full consideration; for if the assignor of a bond be liable to the assignee in case he cannot receive payment from the obligor, and less is paid for the bond, than its real nominal amount, it is usurious.

I admit, that the answer of *Picket* contains strong general assertions, that he paid the whole consideration before notice of *Morris's* equity. But this general assertion is qualified by other parts of the answer, and when he is called upon to state the exact consideration paid for the bond, he refuses to do so, and contents himself with a round declaration that it was *adequate*. In opposition to this evasive denial of those material points, there is one witness, who thinks he gave notice to *Picket* of the equity of *Morris*, before the assignment was made. Independent of this, it appears by the answer that long after the assignment was made, and when it is not denied that *Picket* had notice, he went on to increase the debt due from *Stockdell*, instead of saving himself and *Morris* with *Stockdell's* property in his hands, which it was in his power to have done.

There is then the testimony of one witness, opposed to the answer. Let us see if there be not circumstances in aid of the former, sufficient to outweigh the latter. In the first place, the enquiry which the witness states Mr. *Picket* to have made would have been more naturally thought of *before*, than *after* he had paid his money. 2dly, The silence which the answer observes as to the date of the assignment. 3dly, The appellant's having property of *Stockdell's* so long afterwards in his possession. 4thly, The judgment, which *Morris* had obtained against *Stockdell* in the very town in which *Picket* resided, which as to the discount, is strong presumptive notice. The judgment specifically bound the very subject in which *Picket* was dealing.

RANDOLPH on the same side. *Morris* has a two fold equity against *Picket*; 1st, his right to discount against *Stockdell*, and 2dly, his equity against *Littlepage* on account of the *Kentucky* land. I shall not notice the first point here, as the subject has been fully discussed in the case of *Norton* and *Rose*. But I will make this observation as to the fact of notice; that where an answer is to prevail against the testimony of a single witness, it should be plain, candid, and clear of every appearance of concealment. This answer denies that the defendant knew of any disputes about the bond, instead of being responsive to the interrogatory, whether he knew of any objections to it by *Morris*?

The question then, which is now to be considered is, whether *Picket* is liable to the discount claimed by *Morris*? It is admitted, that *Morris* knew of his bond having passed into the

hands

hands of *Stockdell*; he had therefore a right to keep up *Stockdell's* bond, for the purpose of a discount.

If *Morris* had once a right to oppose *Stockdell's* claim, it should be shewn by what means he has lost it. It is said, that he has waved the right; first, by an express refusal, and secondly, by an implied waiver. The reason which induced the refusal to discount was entirely justifiable. He had no objection to the discount in case he was really indebted to *Stockdell*. But the fact was otherwise; the bond which he held was charged with an equity against it, which might have destroyed its force altogether.

As to the implied waiver of his right to discount, I would ask whether the debt due from *Stockdell* was less binding, because the dignity of it was increased? Or will it be contended, that a judgment cannot be set off against a bond, as well as one bond against another? The only proper time at which *Morris* could make an election which could be obligatory upon him, was when *Stockdell*, or his assignee should bring suit, and when that opportunity did occur, it was made in favor of the discount.

But it is contended, that the act of Assembly does not apply to discounts against *mesne assignees*. The word *plaintiff* which is used by the legislature, obviously expresses the same thing as *assignee* would have done; and if this latter word had been used, it would have run through the whole string of assignees, however numerous they might be. The reason of allowing discounts, being to avoid multiplicity of suits, it applies as well to *mesne assignees*, as to the one, in whom the right to the debt ultimately rests.

The next question respects the jurisdiction of the court of chancery. *Morris*, as I before observed, had a two fold equity; one, which might properly have been decided upon at law; but the other, which respected the *Kentucky* land, was a question, which, belonged exclusively to the court of chancery. If the latter had been the only ground of the application to that court, no one could have denied its jurisdiction. But it is well known, that if that court will entertain the suit at law, it will decide the whole case, though involving points properly determinable at law.

Discounts, are not less a subject of equitable jurisdiction, because they may also be determined at law. Until the statute, the parties were driven into that court to obtain the benefit of discounts, and the jurisdiction is not ousted by its being concurrent

current with the courts of law. Independent of these considerations, there was not only mistake, but accident in this case. The counsel were evidently led off from the true point of discussion, into an enquiry about *notice*, which was entirely unimportant, and from this cause it probably was, that they neglected to file exceptions to the opinion of the court. It was *accident* alone which prevented a new trial from being granted upon the first application, and the offer of *Picket* to wait a month, until *Morris* could have an opportunity of obtaining an injunction, allured the latter from his purpose of renewing the motion.

MARSHALL in reply. Whether the equity attached to a bond follows it into the hands of the assignee or not, is a question I mean not to argue, because, I consider it to be unimportant in this cause. If *Littlepage* himself had been plaintiff, he could not have been opposed by this equitable objection. The only evidence of this equity is, the answer of *Littlepage*, a bill filed in *Kentucky* concerning this land, and a paper signed by *Johnson*, who contests the right of *Morris* to a fulfillment of *Littlepage's* contract. But none of these papers can be considered as evidence of the fact.

If then *Morris* had in reality no equity against this bond, his refusal to discount, was an absolute waiver of his right. It is said that there is no time limited, within which the election to discount, or to waive it, is to be made, and that he might use it at the trial. I do not contend that he was bound to make it sooner, but if he expressly refuse before the trial to make it, and in consequence of his doing so, his bond is assigned away to a fair purchaser, he is bound by it, and cannot afterwards reclaim his right to discount. The reason assigned by *Morris* for his refusal was not real, but a mere subterfuge, used for the purpose of enabling him to purchase up his own bond for less than its value, and therefore it cannot qualify that, which I term an *express waiver*.

I do not say, that the bringing suit upon *Stockdell's* bond was of itself a waiver, or that the judgment could not be made an offset; but it is *evidence* of his mind upon the subject, that the discount was not to take place; for if it had, *Morris* must have been nonsuited, as the bond due from him to *Stockdell*, amounted to a greater sum than what was due to him.

I have contended, that by the literal words of the act, the defendant cannot set up a discount against an intermediate assignee; to which it is answered, that if the law be thus strictly interpreted,

interpreted,

interpreted, a bond can be assigned but once. I cannot clearly comprehend the justness of this conclusion, for it is plain from the words of the law, that any person or persons having the legal title may assign, which must mean, more than one assignment.

If payments be made, or if property be sold to an intermediate assignee, this would be an *actual discharge* of so much of the bond, and might be given in evidence without the aid of the proviso; but this is very different from a *discount*, which could not be made were it not for this law.

If *Morris* could not have set up the discount at law, there is an end of the cause. But if he could, he cannot now resort to a court of equity to get the benefit of it. The whole case has once been tried and decided upon before a competent jurisdiction. I contend, that the same question cannot be re-examined and rejudged in any but an appellate court. I am now speaking of the *discount* alone. The case of *Ambler and Wyld*, does not sustain the jurisdiction of the court of chancery as now contended for. In that case, material testimony was not permitted to go to the jury, and of course, the *whole case* was not before them, nor decided upon by them. This court declared, that if the whole evidence had been laid before the jury, the decision would have been otherwise. In this case, nothing was kept back; the question which we are litigating here, is the very same which was contested and decided by the jury with the very same evidence which is exhibited to this court.

It is said, that the counsel and jury were entangled with a question which was unimportant, and by that means they were seduced from the true point in the cause. This is mere conjecture, and is not warranted by any part of the record. But if it were, I do not agree, that the mismanagement of counsel, or the misconceptions of the jury will give jurisdiction to a court of equity, over a subject which has been fully examined and decided upon by a jury.

It is said, that the court of chancery had an original jurisdiction as to discounts which is not ousted by the statute. This is admitted, and it then follows, that the courts of law and equity have concurrent jurisdiction upon that subject.

It will I presume be admitted, that those courts have also concurrent jurisdiction in matters of account; but because this is the case, will it be contended, that if a suit be brought at law upon an account, and a decision be there had, the very same subject may be re-examined in a court of equity? As well

might a court of law rejudge a case decided upon in equity, under the plea of concurrent jurisdiction.

As to all the other pretences for giving jurisdiction to the court of chancery, they are mere conclusions of the counsel, without being warranted by the record; such are the supposed blunders of the counsel in discussing the equity, instead of the law of the case; in their being dazzled by *Picket's* offer of waiting a month, and being thereby put off from their first intention of moving for a new trial.

It is contended, that *Picket* had notice of *Morris's* discount. This is not proved; but if it were, and if he also knew that *Morris* had *rejected the discount*, he certainly would not have been bound to admit it. Neither is there any evidence, that *Picket* had it in his power to save himself; or that there was any thing like usury in the transaction. These, are points not stated in the bill, and therefore could not be noticed by the court, even if they were proved by the evidence.

As to *Morris's* judgment, it could not be even implied notice to *Picket*, who was not privy to, or bound by it. But there is the strongest reason to believe, that the judgment was obtained after the assignment; for if it had been otherwise, it is highly probable, that *Stockdell* would have offered *Morris's* bond as an offset.

The COURT desired this cause to be spoken to again, upon the points of jurisdiction.

DUVAL for the appellee. The conduct of the court in refusing to seal the bill of exceptions, prevented *Morris* from appealing, and produced an injury, against which a court of equity may relieve. I admit, that the statute points out a mode of proceeding where the court refuse to seal a bill of exceptions; but it does not follow from thence, that equity may not exercise a concurrent jurisdiction over the subject, and prevent the injustice which must result from an unfair trial, or one, where the parties have not been *fully heard*, and where the judgment is apparently wrong. 3 *Morg. Efs.* 291, proves, that a court of chancery will interfere, if the jury be misdirected. So if the court refuse to direct the jury, and they find an inequitable verdict, the Chancellor may with propriety interfere. After many new trials have been granted at law, this court will for the furtherance of justice grant another. 3 *Morg. Efs.* 91.

WICKHAM.

WICKHAM. I think, that the jurisdiction of the court of equity in this case may be maintained, as well upon the general principle and constitution of that court, as upon the decisions of this court on similar cases.

If a want of jurisdiction appear upon the face of the record in proceedings at common law, the judgment may be arrested, or reversed. But in chancery causes, the jurisdiction must be specially objected to by plea. It may be said perhaps, that this bill gives jurisdiction to the court, and that therefore no plea to the jurisdiction could have been properly put in. But since all the material allegations in the bill are proved, the court must retain its jurisdiction, if the bill gave it; if it did not, then it ought to have been objected to by plea.

If the appellant had meant to oppose the relief prayed for, because of the judgment at law, he should have pleaded it in bar, and by answer denied the equity stated in the bill. The County Court when called upon to instruct the jury as to the evidence, and to determine whether the discount which was offered by *Morris*, was legal or not, refused to give any opinion at all, improperly submitting to the decision of the jury, a legal question which it was the duty of the court to have determined.

The case of *Ambler* and *Wyld*, comes fully up to this. The question in that cause was whether the referees had valued the house in specie or in paper money. The original valuation could not be found, and therefore the referees were examined upon that point, who declared, that they had a specie valuation in view. The whole case turned upon their evidence, and *Wyld*, was prepared with testimony to prove, that the valuers had made declarations on the subject, the reverse of what they then deposed. But the County Court before whom the cause was tried, refused to suffer the witnesses to be examined, this court determined that they were wrong in that opinion, and that where the decision of the inferior court was manifestly erroneous, the omission of counsel to file a bill of exceptions, should not bar the jurisdiction of the chancery. The Chancellor said, that if this evidence had been heard, the verdict might have been different. But the ground of the injunction could have been no other, than the error committed by the court, in refusing the examination of the witnesses.

If we refer to British decisions, they will abundantly prove, that equity may grant relief, although the matter has been decided at law.

In

In the case of *Graham vs Stamper* 2 Vern. 146, the defendant in equity pleaded the verdict and judgment at law and that the defendant had insisted upon the same matter at law, where it was ruled against him, and demurred. But this was not thought sufficient to bar the relief prayed for, and the plea was overruled. So in the case of *Robinson vs Bell* 2 Vern. 146, the ground of the bill was, that the plaintiff's attorney had by mistake, and contrary to instructions, pleaded a general, instead of a *special plene administravit*. The court relieved against this mistake although the bill did not state, that the discovery was made before the judgment.

If such be the decisions in *England*, there is a much stronger reason, why a court of equity should be more liberal in granting relief in this country, in cases, which have been decided in the *County Courts*. The want of legal knowledge in those courts, and the loose manner in which business is generally conducted there, will frequently produce improper and unjust decisions of cases, which in many instances could only be remedied in a court of equity. A distinction of this sort is even warranted by English cases. In *Finch Ch. cas. 472*, we find that relief was granted against the judgment of an inferior court, on account of improper conduct, and a distinction is taken between the decisions of *such courts*, and those of the *superior courts*.

Another ground of jurisdiction is the mistake of the jury. The only question was if the debt had been paid: and if the court had determined as they should have done, that the discount offered by the appellee was proper, the verdict must have been different from what it was; yet this opinion of the court was withheld. The jury were led to believe, that the material point in the cause was whether *Picket* was a purchaser, with or without notice, and not being satisfied that he was the former, they found for him. I know, that in *Ambler* and *Wylde* it was said by the court, that if the whole evidence had been left to the jury, the decision would have been otherwise. But it will be noticed, that in this case, the error committed by the jury was in the *law* of the case.

A court of equity will relieve against an award, if there be an evident error on the face of it, or if the arbitrators have mistaken the law of the case. A verdict is not more solemn nor more obligatory upon the parties than an award. This court have gone into the recesses of a jury room, to get evidence of the irregularity and mistake upon which the verdict was given. (*Cochran vs Street*, ante vol. 1 p. 79) In (*Mr Rae*

vs

vs Woods ante p. 80) the jury considered the plaintiff as entitled to half the ticket; but from the evidence, it was clear, that if he were entitled to any part, it could not be to more than a fourth; yet this court sustained the decree of the Chancellor, which awarded a new trial.

It may be contended that *Morris's* attorney might have renewed his motion for a new trial. There is some obscurity upon this subject, and it can only be cleared up by supposing that his counsel was led off from his purpose of doing so, by *Pickett's* offer to stay execution until he could apply for an injunction. It appears, that after a fifth magistrate came upon the bench, the motion was renewed, and then abandoned. But to make the most of this, it was a mistake of counsel, against which this court may relieve.

RANDOLPH. Let us consider this as an original case in the court of chancery; that *Morris* had there filed his bill against *Pickett*, calling upon him to surrender the bond, on the ground of his original equity against it, or because of the discount; or if the ground of the bill had been, that *Pickett* might have saved himself out of *Stockdell's* property, and had failed to do so; in all these cases, the court of equity would have had complete jurisdiction. So it would, if the bill had called upon *Pickett* to discover how much he had paid for the bond; For if *Stockdell* could have sought relief against an unconscionable, or usurious bargain, (which will not be denied,) it is equally clear that *Morris* possessed the same right.

What then is to bar us from this equitable relief after a decision at law? If a verdict be rendered after a *full and fair trial* upon the law of the case, I admit, that the interference of the court of chancery would be improper. But if the cause be mixed with a question of equity, where the jurisdiction is concurrent, as in cases of fraud discounts and the like, and a wrong decision has been given, Chancery will interfere and relieve, although the same points have been pressed at law.

A court of equity will entertain a suit in the case of a lost bond, although there is also a remedy at law, 3 Durnf. and East 151.

The case of *Kent vs Bridgman Prec. in Ch. 233*, establishes this principle; that where there is concurrent jurisdiction, tho' the party at law attempted to avail himself of a point proper for the determination of that court, and failed, yet he might seek relief in equity. Now, although the whole case in *Kent* and *Bridgman* was not submitted to the jury, and therefore an attempt

tempt may be made to distinguish that case from the present, yet it is obvious, that the ground of the decision was not the failure to produce the judgment, but the fraud, which was examinable in equity as well as at law: The Chancellor sustained the cause upon the ground of a concurrent, and not of an appellate jurisdiction.

MARSHALL. The principle which I have endeavored to maintain is this; that when the *whole question* has been completely before the jury, accompanied by no circumstance which could prevent a full and fair decision of the case, by that body, there is no remedy but in an appellate court. If the party apply for relief to a court of equity, he must rely upon other ground than legal errors in the decision complained of. Let all the cases which have been cited be examined, and it will be found in each of them, that the *whole case* was not decided upon by the jury. In 2 *Morg. Ejs.* 291, the jury did not decide upon the discounts. 3 *Morg. Ejs.* is no ways applicable.

In the case of *Kent and Bridgeman*, there was an equity which was not determined at law; there was a fraud practised and proved, but still the party could not recover at law, without a copy of the judgment; of course, the subject of the fraud was not tried at all, and the jury were directed to find for the plaintiff, because the judgment was not produced. This is precisely within the rule I have stated.

It is then contended, that if it were intended to object to the jurisdiction, it should have been done by plea, this is founded I suppose upon the act of 1787, which declares, "that after answer filed, and no plea in abatement to the jurisdiction of the court, no exception for want of jurisdiction shall ever afterwards be made &c."

The construction of this law must necessarily be restrained to cases, where *the bill shews a right in the plaintiff to recover*. For where the plaintiff has no right at all, and if he be barred by a judgment at law, it is not necessary, nor would it be proper to plead to the jurisdiction. Such a plea admits the right of the plaintiff, but denies the power of the court to decide upon it. Thus, if a suit in chancery be brought upon a bond; the plaintiff having a right to recover, the defendant must apprise him in an early stage of the cause, that he means to object to the jurisdiction of the court. But if by the plaintiff's own shewing, or otherwise, it appears that the bond has been paid off, or that he had brought a suit at law upon it, and a verdict

and

and judgment had passed against him; would a court of equity be bound to decree in his favor, because there existed an objection to its jurisdiction, which had not been taken advantage of by plea?

It is said, that the defendant should have pleaded the judgment in bar. But this is not necessary, where the same matter is stated in the answer, and is also relied upon in bar; or if (as in the present case, the plaintiff himself states the judgment in his bill. In *Ambler and Wyld*, the whole case was confessedly not before the jury; for the court would not permit them to hear all the testimony which was offered.

In the case cited from *Finch. Ch. Cas.* 472, the court had no right to decide at all for want of jurisdiction, so that in fact, there was no judgment.

In 2 *Vern.* 146, there was a secret equity, of which the defendant could not avail himself at law; for the court was not at liberty to enquire into the legal error, whilst the question was depending in a superior court. In the case now before the court, there is no equity unmixt with law, since the discount might have been made at law. In the case last cited, the mistake was not triable at law, and of course, it was not enquired into nor decided upon by the jury. The case of *Bosanket and Dashwood*, *Talb.* 90, was a suit to be relieved against an usurious contract.

If the jury mistook the law as to the discount, it does not from thence follow that a court of equity can interfere; for if so, every error of the common law courts may be re-examined and rejudged in this court. In the case of *Cockran and Street*, this court did not set aside the verdict because it was wrong, but because a part of the jury had been imposed upon by the others.

As to the power which it is said *Picket* had to save himself, there is no proof of it.

I am at a loss to comprehend the distinction which is taken between cases of a merely legal nature, and such as are mixed with equity. I admit that in the latter case, the two courts have concurrent jurisdiction, but if the whole subject be decided in the court of law, equity can no more re-examine it, than the courts of law in a similar case could re-examine a decree of the court of chancery.

I admit, that a suit may be brought either at law or in chancery, where a bond is lost. But if it be decided in either court, the other cannot interfere.

ROANE,

ROANE, J.—Wherever a case is fully and fairly tried in a court of law, the decision is binding upon the parties, and a re-examination of the cause in a court of equity is certainly improper. The parties, by submitting to the decision of that tribunal, must be governed by it, whether it be right or wrong. But this principle will extend to no case, where there has not been a fair trial, as well as a full discussion of the cause.

In this case, the appellee at the trial in the County Court, offered the bond of *Stockdell*, as a discount against the demand, which ought certainly to have been allowed. For I cannot consider any part of *Morris's* conduct, as amounting to a waiver of his legal right to insist upon the offset. His refusal at one time to admit the discount, is satisfactorily accounted for. He had strong reasons for believing, that he might oppose the payment of his bond to *Stockdell*, by the equity growing out of the original contract for which that bond was given.

It appears that the counsel for *Morris*, moved the court to instruct the jury, that the discount was proper; this they refused to do, as well as to recommend a special verdict. In consequence of this improper conduct in the court the jury found a verdict most obviously against the very right of the case. For I hold it most clear, that either party has a right to demand the opinion of the court, upon questions of law which may arise during the trial of a cause. Their superintendence in explaining and deciding legal questions, is essential to the proper administration of justice, and ought to be exercised, when either party require their interference.

The second motion which was made for a new trial, was not over-ruled by the court, but for some reason or other which does not certainly appear, it was abandoned by the defendant. Although there is no testimony in the cause leading to a suspicion that *Picket's* offer to stay execution until an injunction could be applied for, proceeded from an improper motive in him, yet it is highly probable, that it tended to divert *Morris*, from his purpose of persevering in the motion.

I think the decree ought to be affirmed.

CARRINGTON, J.—It would perhaps seem strange, that a court of equity should not possess the power of relieving against a judgment at law, obviously unjust, and against the right of the cause. In cases of fraud, surprise, accident, trust and the like, where that court has complete jurisdiction, it is within its peculiar province to grant relief, where the parties cannot obtain

obtain it at law. It is true, that the party asking for its interposition must shew himself entitled to equity superior to that of the person who has unconscientiously obtained the advantage at law.

I admit, that the courts of law and equity should be confined within their proper spheres, and that the line which separates their respective jurisdictions should be carefully guarded. With equal jealousy would I watch over and preserve from violation the trial by *jury*. But it is not less important, that the *court* should exercise those functions which properly belong to them. To the former, belong the uncontrouled power of deciding upon facts and even upon the law if it be submitted to them. The province of the latter, is to determine upon those legal points which come properly before them. It is therefore the duty of the court to instruct the jury upon the law when they are required to do so, or to reserve the point if either party desire it. If the opinion of the court be wrong, there is then a way to get it corrected. If the opinion be right, and yet the jury disregard it, the court may preserve its privilege by setting aside the verdict.

Can it be contended, that this cause was fully and fairly tried, when the only important part of the appellee's case was not decided upon by the jury? When the court refused to state to the jury the law as it respected the discount, they as effectually excluded it from the consideration of the jury, as if they had done it in express terms; for though it was laid before the jury, yet it was a question proper for the decision of the court, and their refusal to give that decision, kept it out of the view of the jury as the verdict evidently proves. The jury were then mistaken in the law, and being involved in unimportant discussions upon points no way relative to the cause, they were allured from the only one which was material.

Independent of this, it is clear that the parties were surprised into the abandonment of their first intention of moving for a new trial, by the offer of *Picket* to stay execution until an injunction could be applied for. It cannot be questioned, but that equity may relieve against the mistakes of a jury, as if they miscalculate, or omit to allow discounts to which the party injured can prove himself entitled.

I think that the case of *Ambler* and *Wyld*, is not distinguishable in principle from this. That cause was determined before a court of competent jurisdiction, but it was determined improperly. The party aggrieved might have appealed, but he did

not; yet this court decided, that equity might relieve him against this *erroneous judgment of a court of law*.

In this case, it is apparent, that there was a struggle for a general verdict, and that the law and right of the case was stifled in the conflict.

I think the decree right and that it should be affirmed.

LYONS, J.—There have been three questions made in this cause; the 1st, has been decided in the case of *Norton and Rose*. The 2d is, whether the conduct of *Morris* has not deprived him of the discount, of which he now endeavors to avail himself. 3dly, Whether, if he be entitled to the discount, he can have the benefit of it after the verdict and judgment against him.

Upon the 2d point, it is contended, that *Morris* having once refused to admit the discount, he has thereby waved his right to assert it against a *bona fide* assignee. How far an unqualified refusal might have bound him, it is unnecessary to decide, because I am clear that his conduct did not amount to that. Whether the equity under which he sheltered his refusal to discount was well founded or not, is not material; it was evidently the cause of his refusal, and it cannot from the circumstances which attended it, be considered as a mere pretext to avoid the discount. There was at the time, a suit depending in the state of *Kentucky*, the event of which he could not possibly foretell. This is sufficient to repel the presumption of an intention to wave. Under these circumstances, it was a fraud in *Stockdell* to assign the bond without giving notice of the discount which *Morris* had against it. Whatever may be the equity of *Picket*, that of *Morris* was prior, and equal to it, besides which, he had a *legal right* to set up his discount. But in fact, *Picket* must be considered as standing in the shoes of *Stockdell*, since it was his duty to have enquired of *Morris* respecting the bond, before he took the assignment of it.

There can be no doubt then of *Morris's* right to relief, unless he be barred of it by the verdict and judgment at law, which brings me to the consideration of the third point.

If what I have before stated be correct, it is clear that *Morris* has a sufficient discount against the claim of *Picket*, both at law and in equity. But it is contended, that he cannot now obtain the benefit of the discount, because he has lost the opportunity which he once had of availing himself of it at law. But I would ask, when it was, that this opportunity presented itself? At the trial of the cause at law, he claimed the discount and it was rejected. Considering the question as a legal one, he

he prayed the opinion of the court upon it, or if they doubted, that they would recommend a special verdict; they refused to do either. He then tendered a bill of exceptions, which they would not sign. He was equally unsuccessful in obtaining a new trial. What more could he have done? The Superior Court could not relieve him, because nothing was spread upon the record which could avail him there. If he had applied for a *mandamus*, or pursued any other method of obtaining relief save the one he did, an execution might have issued, and he must have experienced in the mean time the effect of an unjust and inequitable verdict. And is it possible that a right thus clearly established, should be destitute of a correspondent remedy? I thought it was the peculiar province of a court of chancery, to afford relief, in cases where competent remedy could not be afforded some where else.

I admit, that in this case the party had complete remedy at law and if the cause had been fully and fairly decided there, equity would not have interfered. But this was not the case. The refusal of the court to decide upon the points which were properly submitted to them, prevented a just determination upon the only important question in the cause; and their subsequent refusal to seal the bill of exceptions, shut out the parties from the proper tribunal to have corrected them. Suppose the jury should obstinately decide against the opinion of the court upon a point of law, or should disregard their recommendation to find a special verdict; there could be no relief in a court of law against two improper verdicts, as a second new trial could not be awarded. Would it not be monstrous to say, that in such cases, a court of equity could not afford relief?

The Chancellor was not bound to grant a new trial, because being in possession of the whole case, there was nothing to prevent a final decision.

The case of *Burrows vs Femino*, 2 Str. Rep. 733, the Chancellor relieved against a judgment, upon a point, which he was of opinion the court of law ought to have decided in favor of the plaintiff in equity; but he observed, "that other judges might have been of a different opinion."

Ambler and Wyld is nearly parallel with this, for in that case, as in this, the mischief complained of arose from the error of the court. But there is this difference between them which renders this a stronger case; in that, the party might have appealed; in this he could not, because the bill of exceptions was not sealed.

This

This is certainly a hard case upon *Pickett*, but he who trusts most, must submit to bear the consequences of his misplaced confidence.

Decree affirmed.

L E E,

against

T A P S C O T T.

THIS was an appeal from the District Court of *Fredericksburg*. It was an ejectment brought by the lessor of the appellee against the appellant.

At the trial, the plaintiff in support of his title, offered in evidence a writing in the following words to wit: "To all &c. whereas &c. now know ye, that I the said *Samuel Mathews Esq.* do with consent of the council of state accordingly give and grant unto *Henry Roach* 1700 acres of land, situated and being in the county of *Westmoreland*, bounded &c. [and so describing the bounds] 850 acres part thereof, being formerly granted unto the said *Henry Roach* by patent the 13th of September 1654, and 850 acres the residue, by and for the transportation of 17 persons into this colony &c. yielding and paying &c. dated the 10th of October 1658."

(Signed)

SAMUEL MATHEWS,

W. CLAIBORNE.

"Know all men by these presents, that I *Henry Roach*, do make over, alien, and assign for me my heirs &c. all my right title and interest in the within patent and whole portion of land therein specified and contained unto *Mr John Hoskins* of *Bristol*, his heirs &c. In witness whereof I have set my hand this 13th of February 1660."

(Signed)

HENRY ROACH,

and attested by two witnesses. On the 14th of February 1660 this assignment was acknowledged in court and then recorded.

[Note, the record does not state, that this assignment was endorsed upon the writing first mentioned.]

There

There is also in the record a deed from *Roach* to *Hoskins*, dated in 1660, conveying to him the above mentioned tract of 1700 acres. This deed is set forth in the bill of exceptions.

The plaintiff, alledging that this was a patent, whereby the land in question was granted to *Henry Roach*, under whom the plaintiff claims, the defendant objected, that it was not a legal and sufficient grant, and that it ought not to go in evidence to the jury, and being overruled by the court, he filed an exception to the opinion.

The defendant below offered in evidence to prove the boundaries of the land in controversy, a plat and survey made in the year 1737, by the order of *Samuel Atwell* and *Henry Fitzbush* under whom the defendant derived a title to part of the land in controversy, and according to which plat and division, the lands therein described have been since held by those claiming under the said *Atwell* and *Fitzbush* which plat and survey were recorded in the County Court of *Westmoreland* in the year 1739 also a partition of the said land made by referees appointed by the said *Atwell* and *Fitzbush*. To this evidence the plaintiff objected, and the objection being sustained by the court the defendant excepted. Verdict for the plaintiff for the lands laid down in the survey made in this cause, as comprehended within certain lines described by the jury. Judgment that the plaintiff recover his term yet to come of and in the lands with the appurtenances in the declaration mentioned.

CARRINGTON, J.—The first point relied upon by the appellant's counsel was, that the writing signed "*Samuel Mathews*" could not be considered as a patent, and could not transfer the right of the crown to the lands therein described. It is certainly very informal, as it might well be expected to be at a time, when this country was in its infancy. But I am satisfied, that it possesses all the substantial parts of a grant, and that it was sufficient to convey the land. The case of *Birch vs Alexander* (*ante* vol. I, p. 34) is expressly in point upon this question.

The next objection was to the authenticity of the paper. It has the signature of *Samuel Mathews* with that of *W. Claiborne*, who is not stated to be the clerk.

I might be induced to suspect the authenticity of the grant, if it stood unaided by circumstances; but there are two in the case, which have weight with me. The first is, the length of possession which has accompanied the grant; and the 2d is that a forgery is not to be presumed, where the grant was immediately offered and admitted to record. The

The third objection made to the opinion of the District Court is, that they refused to admit the survey made in 1737, as evidence.

A private survey made by persons who were *strangers to the parties in this cause*, cannot upon any principle of law be evidence against either of them, though it might have been proper as between those, who were parties to the survey, or who claimed under them. The case of *Sir John Bridgman vs Jennings*, 2 *Ld. Ray* 734, which was cited by the appellant's counsel is entirely against him. *Lord Chief Justice Holt*, was of opinion, that a survey made by A of two manors during his seisin of both, might after a length of time be given in evidence in a dispute about the boundaries between A, and B who had purchased one of the manors.

The case of *Underhill vs Durham*, in *Freeman's Rep.* 509, is inapplicable, as it relates only to the copy of a survey where the original was proved to have been burnt.

Upon the whole, I am clearly of opinion, that the judgment of the District Court upon the points suggested in the bill of exceptions was right, but as there is a clerical error in entering up the judgment *generally, for the lands in the declaration mentioned*, instead of pursuing the verdict, it must be reversed, and corrected.

LYONS, J.—I am always sorry when constrained to differ in opinion from the rest of the court. That which has been delivered may be, and probably is agreeable to the real equity of this case, but I must decide according to my own sentiments of the law.

The first objection is to the patent. It recites a former patent for 850 acres dated in 1654, and includes 850 acres more, for which entire quantity the grant is made. It also appears, that in the year 1660, *Roach* assigned this patent to *Hoskins*, and also by a deed pole in the same year conveyed the whole of the 1700 acres to the same person. Now what necessity was there for producing the patent at all? The deed, accompanied with the length of possession was title sufficient for the appellee. But not contented with this, he insists upon the admission of the patent, and relies upon it as proof of his title. This brings me to the question, whether such evidence was proper or not?

It is a sound and well established rule of law, that the best evidence which the nature of the case admits must be produced.

This

This is a safe rule, for the security of property, and should be adhered to. Inferior evidence may be resorted to, where from the nature of the case better cannot be had.

Where it is necessary to rely upon the patent, the original must be produced if it can be had; if it cannot, a copy may be admitted. If the books in which the patent was recorded be lost, or destroyed, evidence still inferior to that may be permitted; such as a memorandum, particularly where the right has always been accompanied by possession.

The bill of exceptions states, that the appellant offered this paper as a patent whereby the lands in question were granted to *Roach*. Now let us examine this evidence of title; what is it? A piece of paper signed by *Samuel Mathews*, who is not styled *Governor* in any part of it; there is no seal to it, nor is it even stated to have been sealed. It is styled a patent in the assignment; but this did not make it one. If the assignor had been examined as a witness, and had declared upon oath that it was a patent, it would not have been sufficient, because he could not have been a witness for himself, and the patent could not have been admitted to record upon such evidence. Much less can the party give it the effect of a patent, by naming it one in his assignment. The *assignment* was acknowledged and admitted to record, but this *patent*, as it is called, never was. For though the clerk has officiously recorded it, yet it is not more authentic on that account, since it was not the act of the court.

Upon what ground then can I feel satisfied as to the authenticity of this paper? The answer to all this is, that it was recorded 130 years ago, and that it has been accompanied by possession; that instead of presuming a forgery, the antiquity of the patent ought to satisfy us of its reality. There is one thing clear; which is, that as it must have the aid of presumption to support it, that presumption is completely repelled by its having been in the power of the plaintiff to produce better evidence.

If the record book could be procured, and no such patent were to be found there, the presumption would be, that no such patent was ever issued. I do not object to the authenticity of the patent; upon a suspicion that it has been forged, but because it is incumbent upon the party who produces and relies upon it, to prove it authentic. The assignment does not in my opinion strengthen the proof of the reality of the patent, because it has no greater weight than the recital of one deed in another,

another, which is only binding between the parties to the deed, or those claiming under it. The antiquity of the instrument, tho' it might have its due weight, if no better evidence could be had, can have no effect when brought within that rule of law, which requires the best evidence which the nature of the case admits of to be produced. If the deed were of recent date, an inferior degree of evidence would be equally admissible, if better could not be had.

But if this had been the best evidence in the power of the appellee, I should still think, that the court erred in the opinion they gave respecting it. They ought to have suffered the evidence to have been given as ground for the jury to presume a grant, leaving the weight of such evidence entirely to them; instead of which, they determined, that the evidence was sufficient to prove, *that a patent had issued*.

As to the survey which was offered by the appellant, I had considerable doubts at first; but I am now satisfied that the court did right in rejecting it. It might be very dangerous, if *private surveys* were to be admitted as evidence of boundary, between persons not parties or privies to them. The one in question is entirely *ex parte*, authorised by no judicial act whatever, and not even strengthened by notice to those persons who might be thereby affected. Neither do I think, that the recording of it can be considered even in the light of presumptive notice, because there was no person who could be regularly cited to contest it.

The recording of a paper which is not required by law to be recorded especially if no notice be given to third persons whose interests may be affected, can never be binding upon them, nor charge them even with implied notice of the fact. If in this case, there had been notice to the neighbours of the survey, or any other evidence tending to create a presumption of assent in the persons interested, I would in that case have left the evidence to the jury.

The PRESIDENT.—The appellant's counsel considered the objection to the patent under two heads; the first went to to the imperfection of the grant; but he afterwards relinquished that point, and of course I should not now notice it, but to observe that the court were unanimously against him.

The second branch of this objection, relates to the authenticity of the grant. I admit the rule of law as it has generally been laid down to be correct. The best evidence

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which the nature of the case admits of, ought to be produced, and if it may be produced, inferior testimony is inadmissible.

But the rule as it applies in *England* to titles respecting land is inapplicable in this country. In that country, patents are not registered, in this they are, and copies from the *register's office* may as well be admitted in evidence as the originals themselves. The question then, is not whether the *copy of a patent* may be given in evidence, but whether a copy from the *records of a County Court* may? Because I take it for granted, that the *paper* offered in evidence by the appellee, and to which the exception is taken, comprehends the *patent* as well as the *assignment*, and proves, that both of them were admitted to record in the year 1660. Upon this point, I am clearly of opinion, that the attested copy of a patent recorded in the *County Court*, is equally authentic, as if, it were obtained from the records of the *register's office*. The latter, is under no other controul than that of the officer of that department, whereas the former, is under the superintendence of a court of justice.

I admit it to be possible, that a forged bond or patent, with an assignment, might be admitted to record; but after such a length of time, and under the circumstances of this case, I cannot presume it. On the contrary, I must presume that the *real patent* was recorded. Neither do I think, that the court went too far in the opinion they gave respecting this evidence. They did not determine that the evidence was sufficient to establish the grant but they over-ruled the objection of the appellant taken to the admission of the evidence.

The next question respects the survey which was offered on the part of the defendant. The exception is not to the authenticity of the survey, for if it were, and no other objection appeared to it I should consider the evidence as being proper. But it is objected, that it is inadmissible evidence as between those *who were strangers to it*. The case of *Sir John Bridgman vs Jennings*, is a compleat authority in support of the opinion of the District Court, and it stands unopposed by any other adjudged case within my recollection. This survey was certainly improper evidence to establish the boundaries of the land in question, and therefore ought not to have been left to the jury. Illegal, or improper evidence, however unimportant it may be to the cause, ought never to be confided to the jury; for if it should have an influence upon their minds, it will mislead them; and if it should have none, it is useless and may at least produce perplexity. Although the acknowledgment, of

the acts of a party may be evidence against him, yet it can never under any circumstances be used in his favor.

A majority of the court being of opinion, that the error in the judgment in not pursuing the verdict, cannot be considered as a misprision of the clerk, the judgment must be reversed with costs, and entered for so much of the land with the appurtenances in the declaration mentioned, as shall be comprehended within the marks and lines described by the jurors in their verdict, together with the damages and costs &c.

JEREMIAH WARDER & JOHN WARDER.

against

RICHARD ARELL.

THIS was an action of debt brought by the appellants against the appellee, in the District Court of *Dunfries*, upon a bond, executed in the state of *Pennsylvania* by the appellee and *Cyrus Copper*.

Pleas 1st payment. 2dly, "that on the 27th of March 1780, the said *Cyrus Copper* in the city and county of *Philadelphia*, in the commonwealth of *Pennsylvania*, on behalf of himself and of the defendant at the house of *J. Warder* (a deceased obligee) was ready, and then and there offered to pay, and tendered to the said *Jeremiah Warder* the sum of £. 882: 2: 6, in bills of credit emitted and made current by the Congress of the United States of America, bearing date a part thereof in the year 1775, and the residue in the year 1776, and requested him to take thereout as much money, as would satisfy what was then due on the said writing obligatory, on account of principal and interest, amounting to £. 844: 18: 10, *Pennsylvania* currency, but the said *J. Warder* then and there refused &c. and that the said sum was not demanded by the said *J. Warder*, or by the plaintiffs within the space of four days after
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the same had been tendered and refused as aforesaid, and that the said sum of principal and interest became forfeited, one third part thereof to the said *Copper* and *Arell*, and the other two thirds to the *commonwealth* of *Pennsylvania*, by reason whereof, and by virtue of a certain law of the said commonwealth made in the first year of the said commonwealth, and in the year 1777, entitled, "an act for making the continental bills of credit, and the bills of credit emitted by resolves of the late Assemblies legal tender, and for other purposes therein mentioned," [which is set forth at large] "and that the said *Cyrus Copper*, on the 3d of April 1780, (the said law continuing still in full force) paid into the hands of the treasurer of the said county of *Philadelphia*, appointed to receive the state tax, two third parts of the said sum due for principal and interest on the 27th of March 1780, and took the said treasurer's receipt therefor, and retained the other third part for the benefit of himself and the defendant: and that the said bond was sealed, signed and delivered in the city, county and commonwealth aforesaid, by virtue of which premises of the said law, the defendant saith he is exonerated and acquitted of and concerning the said writing obligatory &c."

The 3d plea is like the preceding, except that the law is not set forth at large, nor is the payment to the treasurer of the two thirds, stated.

Issue upon the first plea. Replication to the second, "protesting, that the said *Cyrus Copper* was not on the 27th March 1780 at the city of *Philadelphia* in the county of *Philadelphia*, and commonwealth of *Pennsylvania* ready, and did not then and there offer to pay and tender to the said *J. Warder*, the sum of £ 882 : 2 : 6, in bills of credit emitted by the Congress of the United States of America, and bearing date in the years 1775, and 1776, and also protesting, that the said *Warder* did not then and there refuse &c. also protesting, that the said sum of principal and interest did not become forfeited &c. by virtue of the law set forth in the plea, and that the said law was not then in full force &c. and that the said *Copper* did not on the 3d day of April 1780, pay into the hands of the treasurer &c. for plea says, that after making the said recited law in the plea set forth, to wit, on the 20th March in the year 1777, the general Assembly of the said commonwealth, made a law entitled, "an act for emitting the sum of two hundred thousand pounds in bills of credit for the defence of this state, and providing a fund for sinking the same, by a tax on all estates real and personal, and on

on all taxables within the same, which is to the court shewn &c." [here the law is recited at large] "and also the said General Assembly afterwards to wit on the 25th day of May, in the year 1778, made another law entitled "a supplement to the act entitled an act, for the calling in of the bills of credit issued by the legislative authority of *Pennsylvania*, under the sanction and authority of the crown of *Great Britain*, and for other purposes herein mentioned" which is to the court shewn" &c. [here the law is recited at large] "which two laws were in full force on the said 27th of March 1780, without that, that the said defendant is acquitted and discharged of and from the said writing obligatory by virtue of the said law passed in the first year of the said commonwealth and in the year 1777 entitled &c."

The replication to the third plea, is exactly like that to the second, except, that the protestation is confined to the matter of the plea, and the title only of the two laws are set forth.

Special demurrer to the 2d and 3d pleas.

At the trial, the following agreement of counsel was made and entered upon the record to wit, "we agree that the facts severally stated in the second and third pleas of the defendant, and the replications of the plaintiffs, shall be mutually admitted without regard to any matter of form, and that the decision of the court shall be had upon the law arising thereupon, and the acts of Assembly therein recited, in lieu of the demurrer joined between the parties, which with the leave of the court is withdrawn.

The defendant withdrew his second plea, and on argument of the demurrers, judgment was given for the defendant, from which the plaintiff prayed an appeal.

WASHINGTON for the appellant. This case will depend in a great measure upon the just construction of the laws of *Pennsylvania*, where this debt was contracted, and the tender made.

The first act upon this subject passed in January 1777. The preamble of the law, professes to make continental bills of credit a *legal tender*, and to render them *equally current* with state bills, in the discharge of debts, or in the purchase of property. The 2d section, relates exclusively to this subject. The 3d section confessedly relates to *state bills* only, when speaking of their currency. It might perhaps be seriously questioned, whether the clause of forfeiture upon a tender and refusal can be extended to *continental bills*; for since the 2d section fulfills completely what the preamble promises respecting the currency of the continental bills, and their capacity to become the sub-

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ject of a legal tender, and the third section respects *state bills* alone, until the clause of forfeiture is introduced, it may fairly be contended, that the words "if any persons after &c. shall refuse to receive any of *the said bills*" &c. refer to *state bills*, the immediate antecedent to those words. There would have been nothing unnatural in this discrimination, which should make *continental bills* only a tender at common law, and fortify the *state bills* with the additional aid of forfeitures upon those who should refuse to receive them. But if I should be wrong in this construction of the act, I shall still endeavor to shew, that the refusal of *Warder* to accept the *continental bills* which were tendered by *Copper*, did not produce a forfeiture of the debt.

If the third section extends to *continental bills*, it comprehends emissions *subsequent*, as well as those which were *prior* to the passage of the law. The intention of the law was to give them currency, and to create the fullest confidence in the ultimate goodness of the *continental* and *state* money. If to secure these important objects, it was thought necessary to denounce the heavy punishment of forfeiture upon those who refused to receive the paper money, the same reason applied with equal force to *all the emissions*. To discriminate, was to defeat the very object of the law. To leave *subsequent emissions*, crippled for the want of a similar provision, was but half doing the work. If this law does not apply to subsequent emissions as to tender and forfeiture, it does not make those emissions *current*, because the *same money* which is made *current*, is declared to be a *legal tender*; and if this be the case, the subsequent emissions of *continental bills* were for 16 months not current in that state. But this cannot be contended for, and therefore, the conclusion must be, that the law was meant to include subsequent; as well as prior emissions.

After this, the legislature passed a law in March 1777, directing an emission of £200,000 and declaring it only a *legal tender at common law*. This was the first moment, when the legislature appear to have felt the injustice of the tender law. The legal scale of depreciation had then arrived at two for one and we all remember, that the actual state of depreciation was greater than that at which the legislatures of the states, or Congress afterwards rated. But when it was afterwards discovered, that tender laws, armed with all the terrors of forfeiture could not sustain the value of the paper money, or stop the progress of its depreciation, the iniquity of the measure was no longer
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to be countenanced by arguments of policy. And in May 1778 when depreciation had got to 5 for 1, an act passed, the third section of which declared, "that *all bills* of credit emitted and made current by resolves of the continental congress, should pass current in the payment of all debts, in as full and as effectual a manner, as the £ 200,000 which had been emitted in March; and that the refusal to receive them, should subject the parties so refusing, to the same fines, forfeitures and penalties, as such persons were subject to for refusing any of the said emissions of March.

It would seem, that this law had entirely rooted out of the code any thing like a tender, other than such as might be made at common law, and had virtually repealed so much of the act of January 1777, as punished the refusal with a forfeiture of the debt.

But I am aware of the argument which is relied upon by the counsel for the appellee.

It will be contended, that the act of May 1778, applies only to emissions of continental bills *since January 1777*, which it is supposed were not provided for by that act.

I am at a loss for a rule to warrant such a construction. The words of the section which I have quoted are as general as they can be? they speak of "*all the bills of credit* emitted and made current by resolves of congress." I cannot perceive a reason for restraining their operation to *particular emissions*, since if the legislature had intended such a discrimination, nothing could have been more easy than to have expressed it in plain language.

We have in this very law, satisfactory proof, that when the legislature mean to restrain their expressions they know how to do it; for in speaking of counterfeits, they confine them to the emissions *subsequent* to January 1777. If the same emissions were intended by the 3d clause, why did they use a different language?

I can never admit the propriety of a constructive exposition of a statute, where the words are free from ambiguity; it is seldom a safe guide, and can never be tolerated, but when there is no other mode of reaching the intention of the legislature. For a judge to say, that *only some of the bills of credit* emitted by congress shall be a tender as at common law, when the legislature have declared that *all* shall, seems to be taking an unwarrantable liberty with the law.

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The strongest reasons present themselves to my mind, against such a construction. For why should the legislature discriminate between bills emitted on the 28th, and those emitted on the 30th of January? In May, the depreciation of both were equal; it was not more wicked to compel the creditor to receive the one, than the other. Policy no more required this extraordinary interference in favor of the prior, than of the subsequent emissions. But it would be still more wonderful, to discriminate between *continental*, and *state bills*; to afford what was considered as a protection to the former, whilst it was withdrawn from the latter. This would be to presume a very unnatural preference in the legislature to *continental*, over their own money. In short, if the distinction contended for is to be supported, it will be incumbent upon the appellees counsel to adduce strong and irresistible reasons for it.

RANDOLPH on the same side. I beg leave to observe in addition to what has been said, that I shall question the power of a *Virginia* court to enforce the penal laws of *Pennsylvania*, or of any other state. I admit, that in *civil cases*, the courts of one country will execute the judgments, or legislative acts of another; but the law in question is highly penal; and is besides, so far *local*, that it only prevents the right of recovery in the courts of that state, but does not *abolish the debt*. The principle which is stated in the case of *James vs Allen*, *Dallas's Rep.* 188, applies with double force to the present; which depends upon the *penal laws* of a foreign country.

I shall also insist, that if the 3d section of the act of January 1777, comprehends *continental bills*, that the requisites of the act as to making the tender, were not complied with by *Copper*. The debt in question was due to three persons, not associated together as partners in trade, but as jointenants. The words of the law are, "if any person or persons shall refuse," from which I understand, that to produce a forfeiture, the tender should have been made to all three, since if any one had received the money, it would have avoided the forfeiture; and because *one* refused, are the whole to lose the rights which belonged to them?

In some cases, the act of one, is (by a fiction) presumed to be the act of others, though not concerned directly or indirectly in it; but this never happens, where such a fiction is necessary for the enforcing of a penalty.

But at all events, the part of *J. Warder* only (to whom the tender was made) was forfeited, for it is laid down in *Co. Litt.*

186, that a forfeiture by one jointenant extends only to his own interest.

LEE for the appellee. This debt was contracted in *Pennsylvania*, and therefore, if it hath been discharged by the laws of that state, it can never be recovered in this. *Brow. Ch. Rep.* 376. The case of *James and Allen* does not oppose this doctrine. It is in no respect analogous; the insolvent law of *New-Jersey* did not *extinguish, or discharge the demand* of the plaintiff; the debt still remained, and followed the person of the defendant, altho' that person had been *discharged from imprisonment*. It was therefore no bar to an action for a claim yet existing in another state. In this case, if I should be correct in the construction of the *Pennsylvania* laws, the debt itself was absolutely discharged. It is also to be remarked, that in the case of *James and Allen*, the jurisdiction of *Pennsylvania* had attached upon *Allen* before his discharge in *New-Jersey*. Besides, by the agreement made in this cause, the judgment of the court is to be founded upon the *laws of that state*. The words of the act "that the creditor should be forever barred from suing in any court of that state," were *tautologous*; for if the debt was discharged and forfeited by the tender and refusal, no action could have been maintained.

I come now to the construction of those laws which must decide this question. The ground work of the argument for the appellants is, that no discrimination between the prior and subsequent emissions of congress, or between continental and state bills was intended. This is mere conjecture unwarranted as I conceive, by any thing growing out of the laws themselves. To discriminate between the different kinds of paper money was usual in all the states. That the legislatures had such a power is not questioned, and if they exercised it, it is immaterial what were the motives which led to it. There were two modes of raising money in the United States, viz. by emissions, and by loans. It was reasonable to expect, that when redemption should take place, it would be regulated by the value of the money when it was emitted. This has actually been practised by congress as to loan office certificates; and if this rule was a just one in the repayment of money borrowed from individuals, it was equally so as to money paid by the United States to individuals, for articles furnished or services performed to the public. I premise this, for the purpose of shewing, that in the contemplation of men, the different periods at which emissions were made, was important; and it fur-

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affords a stronger reason for the discrimination, which I contend upon the just construction of the act of January 1777; was intended between the emissions of continental bills prior to that time, and such as might afterwards be made.

The legislature in this very law discriminate between the different sorts of their own paper money; for the 3d section does not include *all the state money* which was then current. At this time the different states entertained considerable jealousies with respect to Congress, and it was hardly to be expected, that they would be so forward in passing laws to support their money, as to furnish it with these extraordinary aids before it was created.

It is contended, that the third section of this law, does not comprehend continental bills. The court will consider the whole law together, without regarding the mode in which the entire subject is subdivided into sections. The preamble declares the great necessity there was for making continental and state bills a tender in all payments, and that they should be *alike* taken in discharge of debts. In pointing out the means of producing this *likeness*, the subject is arranged into different sections, but surely this cannot change, or affect the spirit and intention of the law. "Said bills" in the third section, must refer to the bills which had before been mentioned, and declared a legal tender; and those were *continental* as well as *state*.

The act of March 1777, does not in any part of it relate to that of January 1777; the sixth section refers to the £200,000, and to no other state money, and as it is admitted, that this clause speaks only of a tender at common law, the legislature again discriminate between the different kinds of their *own money*.

Thus the laws stood at the time the act of May 1778 was passed; at this period, there were emissions of continental bills in circulation, which had been made since January 1777, and which of course, having not been noticed in that law, required the aid of the legislature to make them a tender; for this purpose only could the 3d section of that law have been intended.

It is contended, that this law virtually repeals the 3d section of the act of January 1777. Upon what rule of law is this argument founded? I have always supposed, that if there be two *affirmative* statutes, between which there is no collusion, that the one does not repeal the other. A constructive repeal is never to be admitted, if by a fair interpretation of both statutes they may consist together, and both be rendered effectual. Now, there is no inconsistency in confining the operation of

the last law to emissions subsequent to January 1777, and the first to emissions prior to that period. "All the bills of credit," in the 3d section, will then mean, *all such as have not been before provided for by the legislature.* Or if these words be so broad that they must include the emissions prior to January, there may be another construction given to them, without forcing us upon the dangerous experiment (for such it must always be unless warranted by absolute necessity,) of repealing laws by implication. It was doubtful whether continental bills of credit were a tender at common law, unless declared to be so by an express statute. A declaration of this sort was even thought necessary as to the £ 200,000, of state bills. Now, though the act of January 1777, had made a tender and refusal under certain restrictions a forfeiture of the debt, yet it might have been doubted, whether this had made continental bills of prior emissions, a tender at common law. The intention therefore of the 3d section of the act of May 1778, if it refers to all the emissions of continental bills, might have been to make the whole of them a tender at common law.

All the reasoning on the other side, to prove that the legislature could not have intended a discrimination between the different emissions of continental bills, is answered by the laws themselves; for it must be admitted, that a tender and refusal of the state money emitted by resolves of the late Assemblies, and on loan, prior to February 1777, produced a forfeiture of the debt, which was not the case with the emission of March 1777; and if so, what reason can be urged against a similar discrimination between continental bills?

On the other hand, if the act of May 1778 repeals the 3d section of the act of January 1777, great injustice would follow. It would operate as an *ex post facto* law, as to those, who after January 1777, may have sold their estates on credit, under an expectation of being able with the money to discharge the debt they owed.

The case of *Johnson and Hocker*, *Dallas's Rep.* 406, decided in the Supreme Court of Pennsylvania, is decisive upon this point, and will be regarded by this court as an authority entitled to its respect; I will not say it is binding upon this court. But since we are discussing a question which grows out of *Pennsylvania* statutes, and it is admitted that if this very case had been decided in that court it would have bound this, a decision of a similar question in that court will be adopted here, unless it be obviously wrong. Much more will it be adhered to, when the

the single question is, the construction of laws attended with considerable ambiguity. Extraneous circumstances are often called in to aid the interpretation of a doubtful statute, and the lights drawn from thence must have been more clear to a *Pennsylvania* court, than they can be to the courts of any other state. Having said thus much for the decision, which is complete upon the very point in discussion, I have only to add, that this book is considered as authority in the *Pennsylvania* courts, and as such will be respected in this court.

It is contended, that this court will not execute the penal laws of other states; be it so. But there is a wide difference between an action instituted to *enforce* a penalty, and a *defence* which goes to *avoid the payment of a debt*, extinguished by the operation of existing laws.

It is said, that the tender ought to have been made to all the obligees. When the legislature speak of a *tender properly made* they use a technical term, which for its explanation must be referred to the common law; the consequences only are statutory. Now we all know, that at common law, a tender to one of three joint obligees is sufficient, and a refusal by one, suspends the interest as to all.

It is admitted by Mr. *Randolph*, that a tender to one would be a discharge as to the interest of that one; if so, all must be discharged, because that one could not join in the action if his interest were gone, and it is clear, that the other two could not maintain the action whilst the other was alive. In cases of joint debts or duties, the act of one is the act of all; payment to one is payment to all, and so too is the refusal of one, the refusal of all.

RANDOLPH.—I shall consider this question under three heads.

1. If the act of January 1777 be penal, as I shall endeavor to prove it is, it ought not to be executed now, and here.

2. Under the just construction of the act of January 1777, continental bills are not comprehended in the third section.

3. If comprehended the forfeiture there contemplated, is done away by the subsequent laws.

1. The principle, that the courts of one country will not execute the penal laws of another is not denied. But it is said that the attempt made by the defendant is not to *enforce a penalty*, but to *avoid the payment of a debt* discharged by force of a statute. Substantially, it is the same thing. Suppose, that instead of abolishing the debt, a penalty equal to the same amount

amount had been denounced, in case of tender and refusal. What difference would there be between an attempt to enforce this penalty, and a defence, which claims the benefit of a forfeiture of the whole debt. In both cases there is a penalty; in both the court is called upon to give it effect. Suppose the punishment denounced upon the refusing creditor had been attainder or outlawry; would this court have sustained such a plea in bar of *Warders* suit? It surely would not.

This is a personal action, and in its nature fugitive; it is not fixed to the soil of *Pennsylvania*, but may be sued for any where. Suppose the creditors and debtors had been citizens of *Virginia*, and being in *Pennsylvania*, the tender and refusal had there taken place. It is clear that it could not have been pleaded as a bar to this suit, although *Mr. Lee's* argument would lead to a different conclusion. I admit, that *Warder's* remedy was gone in a *Pennsylvania* court, but his right was not extinguished; for if it were, why does this act give the debtor a remedy to recover his bond from the creditor? It could be for no other reason, than because the legislature supposed there remained a latent right which might be asserted in some other country. If I am correct in this, the case of *James and Allen* (so far as that, or any other decision of a *Pennsylvania* court can be considered as authority here) is in point.

It is contended, that the clause of the law which ousts the right to sue in the courts of *Pennsylvania* was tautologous. If so, there is nothing else in the law which would give to a tender and refusal any other effect than a tender at common law. The agreement made at the trial of this cause refers not only to the *Pennsylvania* acts of Assembly, but leaves the case open to the operation of general of law.

The case of *Johnson and Hooker* is considered as conclusive. As authority, I deny it. It is the decision of a court, which tho' supreme in name, is but subordinate in fact. The judgments of that court were subject to revision in a Superior Court, and this very case may have been reversed for any thing that we know to the contrary; for the decision was made in 1789, and there are no reports of cases in the High Court of Errors and Appeals, since the year 1788. Neither can I agree, that that court had more lights, or was from its situation more competent to decide upon the construction of a *Pennsylvania* statute, than this or any other court of equal ability would be.

I come 2dly, to the construction of the act of January 1777. The 2d section of the law does no more than establish the currency

reney of the continental bills. It is contended, that the 3d section is connected with, and operates upon the 2d. That two distinct sections of a statute which is to be *liberally* construed, may be connected and melted together, I do not deny. But it is otherwise in laws which impose *penalties and forfeitures*. Suppose, that instead of the forfeiture spoken of in the 3d section, it had been fine and imprisonment; would not the court have been tied down to a strict construction, and would it have been proper to go out of one section into another, for the purpose of hunting after penalties?

The 3d section begins by declaring, "that state bills shall be considered as a legal tender, and shall be received in payment of debts according to the sum specified in *said bills*." What bills? Why surely *state bills*, because the value of continental bills had been fixed by the 2d section. When the law goes on to speak of a refusal of *said bills*, it must necessarily apply to *state bills*, which were clearly meant before, and were alluded to in the same clause.

For this discrimination, (which I think was intended, a sufficient reason may be assigned. The state bills had been issued under the *legal government*, and fortified by taxes for their redemption; this was not the case with the *continental* money. The superior value of the state money was afterwards acknowledged by the legislature, when they passed a law to prevent that money from being locked up, and preserved on account of its supposed value over other state money.

But if the 3d section do extend to continental bills, I insist, that the requisites of the law have not been complied with. I object that the tender was made to one of the obligees only; it is answered, that at common law, a tender to one is a tender to all, and that so it must be under this statute.

I admit the principle, if the bond be in the possession of the obligee to whom the tender is made; but I deny the conclusion even if this fact appeared. Where a tender and refusal is to produce a forfeiture of the debt, the act of one is not binding upon all. If it be, I am at a loss to understand the meaning of the words "person or persons" connected with what follows, "that he, she or they shall be barred from suing" &c. I admit that payment to one, would be payment to all, for that would be a *satisfaction* of the debt; payment could not be made to all. But where a forfeiture was to be the consequence of a refusal, the tender ought to have been made to all, because if one refused, another might not, and thereby the forfeiture might

might have been saved. It is said, that if one be barred, the others cannot sue. This is not admitted. If one obligee be outlawed or attainted, the others may sue.

The next law which I shall consider is, that which passed on the 23d of March 1778, page 115 of the *Pennsylvania* laws, and which, tho' not stated in the pleadings, may be referred to under the agreement. At this time, there were three sorts of state money current in *Pennsylvania*: 1st, the emissions by resolves of the late Assemblies, during the proprietary government; 2d, emissions on loans by the act of Assembly of the 26th of February 1773, which was also during the former government; and 3dly, the emission of the 20th of March 1777.

The two first classes are called in by the law under consideration, and are to be exchanged for the emissions of the 3d class. Of course, there was no state money remaining in circulation except the £ 200.000, and none which could be tendered under the act of January 1777. Would it not be wonderful then, that the legislature should leave the continental bills under the operation of the act of January 1777, strengthened and supported by forfeitures, and permit their own to languish under the less efficient qualities of a tender at common law? The legislature supposing, that continental money was assisted only by the second section of the act of January 1777, do by the joint operation of this law and that of March 1777, place all the state money upon the same footing with the continental. And having done this, the act of January 1777, was no longer necessary, and is repealed by that part of the law now under consideration, which repeals "each and every of the acts of General Assembly by which the state money issued by the legislative authority of *Pennsylvania* under the authority of the crown of *Great Britain*, or any part thereof had been made current."

3d point. But if this be not the operation of those laws, and if the 3d section of the act of January 1777 does refer to the 2d, then I contend, that the act of May 1778, does completely repeal so much of it as makes a tender and refusal of any continental money a forfeiture of the debt. The words of the law are general; if a discrimination between prior and subsequent emissions had been intended, it could easily have been expressed. The 4th clause is a proof that the legislature knew how to limit their expressions to posterior emissions when they wished to do so. But if, as I have before contended, the act of March 1778 repealed that of January 1777, then we perceive a sufficient reason for the general expression used in the act of May 1778.

ROANE,

ROANE, J.—This contract having been made in *Pennsylvania*, without a view to a performance in any other state, the agreement made upon the trial of the cause referring to those laws, was an act of supererogation, and entirely unnecessary, for it is clear, that the laws of that country where a contract is made must govern the fate of it.

The rule which I have just mentioned is laid down in the case of *Robinson vs. Bland* 2 Burr. 1679, and is well explained and illustrated in *Fonblanque's* excellent treatise on equity 2 vol. page 443.

It is true, that the laws of one country, have not in themselves an *extra territorial force* in any other; but by the general assent of nations, they are always regarded in contracts formed there.

A distinction however is attempted in this case, under the idea, that this is a *penal law*, and that the courts of one country will never execute the penal laws of another. The principle, is true, but inapplicable. The law of 1777, points out a mode of *discharging debts* different from that which is customary; it may produce an injury, but it is not therefore penal. The case cited from *Brow. Ch. Rep.* 376 is in principle like this. *Payment* in depreciated paper money was a penalty (under this interpretation of the word,) in *South Carolina*; beyond what existed in *England*; yet the *lex loci*; prevailed. The only difference between that and this case is, that in that, the loss was partial, in this total, but the principle is precisely the same.

We are now to enquire, how the law of *Pennsylvania* stands upon this subject. The act of January 1777, in the preamble declares, “that the emissions of continental and state bills ought to be *alike* taken in discharge of debts” &c. To effect this, it was necessary to make them *alike in all those qualities*, which were any ways connected with the payment of debts. If received by the creditor, they were alike a discharge of so much of the debt. But if a *tender* and *refusal* of continental money, was not a discharge of the debt, it was not *alike taken* with state money, because if state money had been tendered and refused, the debt would have been discharged.

The 3d section declares “that the state money” there described “shall in like manner be a legal tender and be received in payment of all debts as aforesaid” &c. Now the two descriptions of money would not be alike in their tenderable qualities, if the refusal of one discharged a debt, and the other did not. So that, if the words “said bills” in the next sentence, do not

refer

refer to continental bills, yet by assigning certain qualities to state bills, they at once attach to continental bills, which it is declared are to be *alike taken in discharge of debts, and to be in like manner a legal tender.*

But the 6th section of the law clears the question of all doubt as to the operation of the 3d clause, upon continental bills. It declares, "that where any person stands bound to pay sterling money, the creditor shall receive *continental bills*, of credit, or state bills in payment thereof at a particular rate, if *tendered as aforesaid, and on refusal thereof, shall be deemed and taken to be within the meaning of this act in cases of refusal of the bills of credit in tender as aforesaid.*" And there can be no doubt, but that the clear scope of the law was to assimilate continental to state bills in their tenderable quality.

The next question is, was this act in force at the time the tender was made.

It is argued by the appellant's counsel, that the generality of the expressions in the 3d section of the act of May 1778, operated a virtual repeal of the act of January 1777, so far as it related to a tender and refusal of continental bills, producing a forfeiture of the debt. It is contended, that the legislature began then to acknowledge the injustice of the act of January 1777. Yet in March 1778, when it was equally discernable, the legislature only repeal the law as to state bills.

Every rule of construction is opposed to the argument of the appellant's counsel upon the operation of the 3d clause of the act of May 1778. The court will never favor the repeal of a law by implication. 4 *Bac. Ab.* 638.

If there be two affirmative statutes upon the same subject, the one does not repeal the other, if both may consist together, and we ought to seek for such a construction as will reconcile them together.

The words *all the bills of credit*, must be confined to such as had not been before provided for consistently with the intention of the legislature; and there were, the emissions subsequent to the 29th of January 1777. By this interpretation of the words, all the laws are reconciled, and we avoid the necessity of an implied repeal, which if it had been intended, we ought reasonably to suppose it would have been expressed. The words, "all the bills of credit," in the case of *Johnson and Hocker*, were not considered as producing the effect which has been contended for; and though I do not consider myself bound by that decision, yet the authority of it is entitled to respect, and fortifies my construction of the laws.

Upon

Upon the whole, I think the judgment should be affirmed.

CARRINGTON, J.—The only question arises out of the construction of the laws of *Pennsylvania*, which must assuredly govern this contract, as it was formed in that state, and discharged there, if it be discharged at all. I have read with attention, and have considered all the laws of that state upon this subject, and I entirely concur with the judge who has preceded me, in the construction and operation of them. The appellee having conformed to the law of January 1777, he must enjoy such benefits as that law gave him, unless he was deprived of them by subsequent laws. In March 1778, the legislature call in those emissions which had been made a legal tender by the act of January 1777, and a refusal of which, was declared to be a forfeiture of the debt; but they do not expressly, or by implication repeal that law, except as to such emissions. The legislature so far from discovering a disposition to relax at this early period, emitted more money as late as April 1781, and declared it a legal tender. The first law which operated a repeal of the act of January 1777, passed in 1781.

It is contended, that the act of May 1778 virtually repealed it. If the two laws may be reconciled, a constructive repeal is inadmissible, and that they may be, has been already demonstrated by the judge who has given his opinion. The case of *Johnson and Hocker*, is expressly in point, and accords entirely with my sentiments upon this subject.

The operation of the act of January 1777, upon this case, has been denied, under an idea, that it is penal, and consequently, not to be enforced by the courts of this state. But the appellee in this case is not in pursuit of a penalty, and does not ask the aid of the court to enforce it. He protects himself from the claim of the appellants, by pleading a discharge by the laws of another state having competent power over the subject. I confess that the opinion of judge *Shippen*, in the case of *James and Allen*, appears an extraordinary one to me; I cannot discover, how the demand in that case could be considered as local. The judgment in *New-Jersey*, did in my mind completely extinguish the original claim; for suppose the debt had been due by bond, the bond would of course have been filed in the cause, and tho' an action of debt might have been maintained upon the judgment, yet surely it could not have been upon the original debt, which was merged in the judgment.

As a payment to one is a payment to all the joint obligees, so it is clear, that a tender to one is a tender to all; for if this

were not the case, it would be almost impossible to make a valid tender, where there were many obligees.

As to the hardships of this case, we have nothing to do with it. The state has got two thirds of the money, and it would be equally hard, if not more so upon the debtor, if he were now obliged to pay the whole again.

The PRESIDENT. Though very much indisposed, I will endeavor to state the grounds of the opinion which I am to give. The question is, whether the tender and refusal in the present case, produced a forfeiture of the debt according to the laws of *Pennsylvania*, or whether it operated only as a tender at common law, to stop the interest until again demanded.

But before I consider the case upon its merits, I will endeavor to clear it of some preliminary objections made by the counsel. The first was, that the act of January 1777, should not be regarded by us, because it is penal, so far as it relates to the tender and forfeiture.

It seems to be admitted on all hands, that in cases of contracts, the laws of a foreign country where the contract was made, must govern. The same principle applies, tho' with no greater force, to the different states of *America*; for though they form a confederated government, yet the several states retain their individual sovereignties, and with respect to their municipal laws are to each other foreign.

But this is called a penal law. It may deserve very hard names, but it cannot be called penal. It is not for us to justify the morality of the law, but to understand clearly the legislative will and to execute it. If the law had subjected the creditor to a penalty for his refusing to receive the money, and the debtor were now prosecuting him to recover it, the principle contended for, which I admit to be correct, would then apply. But it is *the creditor who sues*, and the defendant pleads a discharge of the debt which is the foundation of the action, under the laws of that country, where the contract was made. It is no more penal, than the act of limitations, the bankrupt laws or the like. The decision in the case of *Johnson and Hacker* is upon the very point, and is complete. Being however a single case, and subject to revision, it has not the authority of a determination of the supreme judiciary of that state, and would not perhaps be considered even there as absolutely binding; but it may with propriety be referred to for illustration, and as such, is entitled to the respect of this court.

Upon

Upon the merits. The first objection made by the appellant's counsel is, that the 3d section of the act of January 1777, must be confined to *state bills only*; that the words "*said bills*" refer to them as the next antecedent. However this may be according to the strict rules of grammatical construction, it is not the correct rule of interpreting a statute. To get at the meaning of the legislature, we are not confined to the order of the sentences, but must take into view the whole law. The legislature have said enough to shew, that their intention was to place continental and state bills upon the same ground. The 2d section makes the former current, and receivable in payments and discharge of debts. The 3d declares, that states bills shall in *like* manner be a legal tender, and be received in payment. Then follows the effect of a tender and refusal, and the words, "*any of the said bills*" comprehends each class *before mentioned*, and cannot be confined to any one of them. It is to be remarked, that in the 13th and 14th sections of the same law, the former of which declares the penalties for refusing, and the latter for counterfeiting the money, the same expression ("*any of the said bills*") is used. Although the subject is divided into sections, I have no doubt, but that the spirit, as well as the just exposition of the words of the law comprehends continental, as well as state bills, in the clause which respects the forfeiture. The reason for dividing the subject into sections is obvious; the second describes *at what rate continental dollars* should be estimated in *shillings and pence*, which was not necessary as to *state bills*.

We are next to enquire, if this law be repealed expressly, or by implication? The act of March 1777, directs an emission of £ 200,000, and declares it a legal tender. It was of course, a tender only at *common law*. The 10th section of this law declares, "that *all bills* emitted before the 1st of July 1759, shall not pass in payment of any debt or demand, except for taxes &c." but not a word is said respecting *continental bills*. yet it was contended at the bar, that the words, *all bills*, operates a repeal of the act of January. The rule is, that where there are two affirmative statutes, if they do not conflict with each other, the latter does not repeal the former. Repeals by implication are never favored by courts. Whatever apparent inconsistencies may appear in the declarations of the legislative will, yet it is not decent to presume that they would change their mind upon the subject, without saying so in express terms. But if the two laws are absolutely in opposition to each other, then

then since the latter will prevail, the former must of necessity be considered as being altered. If however there be different subjects for the two laws to operate upon, there is no inconsistency, and consequently no necessity for presuming a repeal. Now apply these principles to the present case. Continental and state bills, were the subject of the first law; that law may still subsist in all its force as to the former, without in the least conflicting with the act of March 1777, which is confined to states bills. The same observations apply to the act of March 1778; it applies to *state bills* altogether, and was intended to destroy the preference, which the legal money had obtained over that emitted by the state. In the same manner is the act of May 1778 to be interpreted, which speaks expressly of continental bills. There were emissions prior, and others subsequent to January 1777. The former were provided for by that act; the latter were not. This law then may with propriety, and with great reason be applied to the subsequent emissions, by which the necessity of an implied repeal of the first law is avoided.

But it is contended, that if the act of January 1777, was in force in March 1780, the tender was not made conformably with the requisites of that law: that it ought to have been made to all the obligees. As a payment to one is a payment to all, it as certainly follows, that a tender to one is a tender to all. So a release by one, binds the whole. There were four days of grace allowed, in which time the obligee, to whom the tender was made, might have consulted with the others.

Upon the whole, I concur with the rest of the court, that the debt in question was discharged by the tender and refusal, and therefore,

The judgment must be affirmed.

Y O U N G,

against

S K I P W I T H.

THIS was an appeal from a decree of the High Court of Chancery, wherein the appellee was plaintiff. The suit was brought for a specific execution of an agreement, whereby

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whereby the defendant was to purchase a tract of land on the joint account of himself and the plaintiff; the prayer of the bill was for a partition of the land according to certain boundaries agreed upon by the parties, and for a conveyance. The court of chancery decreed in favor of the plaintiff, and directed the surveyor of the county to run a line of division, and to report the quantity of land on each side thereof.

After a very lengthy argument in this court upon the merits of the case, the court dismissed the appeal, as being prematurely prayed before the final decree and remanded the cause to the court of chancery.

B O O T H'S Executors,

against

A R M S T R O N G.

THIS was an appeal from a judgment of the District Court of *Winchester*. It was an action of debt, brought by the appellee, upon a bond given by the testator. Plea, setting forth sundry judgments obtained against the defendant, and "that he hath fully administered, all the goods of the testator which had come to his hands to be administered, and that he hath not, nor had &c. any goods &c. except the value of £ 133 : 3 : 3, which are not sufficient to satisfy the said judgments" &c. Replication, "that the defendant hath, and on the day of commencing this suit had divers goods &c. more than sufficient to satisfy the said judgments in the said plea mentioned, whereof he could have satisfied the plaintiff for his debt aforesaid."

The verdict was in the following words viz: we of the jury find for the plaintiff, the debt in the declaration mentioned, and one penny damages" judgment *de bonis testatoris* &c. &c. *si non* the costs *de bonis propriis*.

WICKHAM for the appellant. It is clear law, that upon a special or general *plene administravit*, it is necessary, that the jury, if they find for the plaintiff, should ascertain the amount of the assets. This verdict finds only that the truth of the issue is with the plaintiff, but it does not ascertain the value of the assets unadministered.

MARSHALL,

MARSHALL for the appellee. I shall not controvert the doctrine stated by Mr. Wickham, with this qualification that if the jury find assets sufficient to satisfy the debt, they need not find the precise amount of the assets. The reason of the rule is obvious, and will warrant this limitation of it. Now in this case, the plaintiff having replied assets *sufficient* to satisfy the judgments mentioned in the plea, as well as the debt in question, and the jury having found the whole is due for the plaintiff, they have in fact found, that the defendant had assets sufficient in his hands. It was therefore unnecessary to ascertain the exact amount of the assets. The verdict is substantially right, and the court will mould it into form.

WICKHAM. I do not think that the court can with the most liberal disposition to support this verdict, consider it a special finding, responsive to the issue; for if the defendant had but one penny more than sufficient to satisfy the judgments, it falsified the plea; and therefore it was incumbent upon the jury to find the issue in favor of the plaintiff. But it is agreed, that the plaintiff ought not to have a judgment for the whole debt, unless the court can be satisfied that there are assets sufficient to pay it.

The COURT was of opinion that the verdict to be set aside "as being uncertain and insufficient in not finding on the issue, that the appellant had goods and chattles which were of the decedent at the time of his death in his hands to be administered, more than sufficient to satisfy the judgments in the appellant's plea set forth whereof he could have satisfied the appellees demand, or the value of the said goods and chattles, if not sufficient to satisfy the said demand."

Judgment reversed, verdict set aside, and the cause remanded.





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1. In an action of debt upon a bond with a collateral condition, the jury may assess damages beyond those laid in the declaration, if the penalty be sufficient to cover them.

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DEVISE.

1. The testator devises certain lands to his son *James* for life, remainder to his son *Muscoe* and his heirs in trust, and for the use of the first and every other son of his son *James* who should survive him in tail male equally to be divided; but if his son *James* should die without male issue, then he gives the said lands to his son *Muscoe* during his life, with like remainders &c. to his other sons, and to three grandsons he also devises

lands with like limitations, and then desires that the widows of any of his said sons and grandsons should be entitled to dower &c. *James* took an estate for life in possession, with remainder in tail male, expectant upon the determination of the estate tail to his surviving sons.

Roy vs Garnet. 9

2. In the above case, the estate for life did not incorporate with the implicative branch of the devise, because the estates were of different natures; the former being a *legal* estate, and the latter remaining an *equitable* estate not executed by the statute, for the want of male issue of *James* coming into *esse*. *Ib.* 34 35

3. The estate tail in *James*, expectant upon the determination of the estate to surviving sons, was not bared by the act of 1776, being to take effect after a greater estate than for life or lives. *Ib.* 35

4. A man devises, that as much of his land should be sold as would be sufficient to pay his debts. To his wife he gives a moiety of his lands remaining after his debts are paid, and the residue of his estate and the reversion of the land given to his wife, to go to his children. The executor ought not to sell the reversion; if he do, a court of equity will set it aside upon the application of the children.

Brock, &c. vs Philips. 68

5. Devise to E. C. the testator's daughters, of the interest of

of £4000 government funds during her life, and at her death, the interest of the said £4000 to four grand children equally, and at their decease, the principal and interest to be disposed of by them to their heirs. E. C. released to the husband of one of the grand-daughters, all her right to the interest of £1000 of the said certificates. The grand-daughter died in the lifetime of E. C. and her husband as her administrator having filed his bill to recover the said £1000 of certificates, obtained a decree. *Goodwin vs Taylor.* 74

DISCOUNT.

1. S being indebted to M afterwards obtains by assignment the bond of M, to an equal amount. He offers a discount, which M refuses, because he supposed he had an equitable objection against the payment of his bond in the possession of S. S. assigns over the bond to P. for valuable consideration and without notice. Under all the circumstances of this case, the conduct of M, was not considered as a waiver of his right to discount, and he was permitted to off-sett the bond of S, against his bond assigned to P.

Picket vs Morris. 255

E.

ENTRY.

1. An entry by *Lord Fairfax* for a forfeiture, was only necessary where a grant had been made; the issuing of the second warrant was sufficient.

Pickett vs Dowdall. 114

EQUITY.

See ASSIGNMENT No. 5.

ERROR.

1. See APPEALS, &c.

2. If judgment be improperly entered against a sheriff for not taking bail, it is erroneous as to the original defendant and he may reverse it.

Ruffin vs Call. 181

ESTATE TAIL.

1. An estate tail expectant upon the determination of a greater estate than for life or lives, not bared, or affected by the operation of the act passed for docking entails in 1776.

Roy vs Garnett. 35

2. See DEVISE No. 1. 2. 3.

EVIDENCE.

1. In an action for freedom, a verdict finding the mother (the plaintiff) to be free or a slave, is *conclusive evidence* between a child of the plaintiff, and one claiming under the defendant in that suit.

Shelton vs Barbour. 64

See PLEADING, No. 1.

VARIANCE No. 3.

2. What proof as to the inability of a witness to attend, is necessary where his deposition, taken *de bene esse* is attempted to be read.

Collins vs Lowry. 75

3. Where a deposition is read at common law, whether taken *de bene esse*, or in chief, it should appear upon the record, upon an appeal, that notice of the time and place of taking it had been

8. A TABLE OF THE PRINCIPAL MATTERS.

been given to the adverse party. 75

4. The general rule is, that hear-say evidence is inadmissible; to this there are exceptions; but if it be admitted and excepted to, such a case should be stated upon the record as to show, that it came within some of the exceptions to the rule, otherwise the general rule will be against the admission.

Claiborne vs Parish. 146

5. The testimony of a witness tending to fix a fraud upon himself ought not to be regarded.

Ib.

6. An entry by an administrator, of money paid over to the guardian admitted as evidence to charge the guardian *under all the circumstances* of the case, the administrator being dead and his hand writing proved.

Brown vs Brown. 151

7. A letter, stating that the writer had heard of a slanderous report, is good evidence to prove the *circulation of the report*, and may be read for that purpose, the hand writing of the person being proved. But it would be inadmissible, to prove that the defendant had propagated the report.

Schwartz vs Thomas. 167

8. Upon the plea of 'no such record,' if the record be of the *same court*, a copy of it ought not to be given in evidence, but the original ought to be produced in court for inspection.

Burk's Ex. vs Tregg's Ex. 215

9. A grant admitted as evidence, tho' it wanted many of the formal parts of a deed.

Lee vs. Tapscott. 276

10. The rule in *England*, 'that the best evidence which the nature of the case admits of, ought to be produced,' tho' generally true, is inapplicable as it respects titles to lands in this country; a copy of a patent, either from the records of the register's office, or of a county, is as good evidence of title as the original would be. 281

11. The copy of a patent, signed, '*Samuel Matthews, W. Claiborne.*' dated 1658, and recorded in a county court, together with an assignment of it, (which assignment was acknowledged and admitted to record, but it does not appear that the patent was proved or acknowledged,) was admitted as evidence of title, though it did not appear, that the patent was signed by *Mathews, as Governor.* 276

12. A private survey may be admitted as evidence of boundary between those who were parties to it, or who claim under them; but not as to strangers. *Ib.*

13. Illegal, or improper evidence however unimportant to the cause, ought never to be confided to the jury. 281

14. The recording of a paper which is not required by law to be recorded, especially if no notice be given to third persons

A TABLE OF THE PRINCIPAL MATTERS.

9

persons whose interests may be affected, can never be binding upon them, nor charge them even with implied notice. 280.

EXECUTION.

1. Judgment in the county court of *F*, where the defendant resided; a *ca. sa.* cannot be served upon him in the county of *H*, whither he had gone at the time the execution was levied, but no proof was made of his having moved his property out of the county of *F*.

Brydie vs Langham. 72

2. See FORTHCOMING BOND No. 2. 3. 4. 5.

EXECUTORS.

1. See SLAVES No. 1. 2. 3. VERDICT No. 3.

2. A man devises that as much of his land should be sold as would be sufficient to pay his debts; to his wife he gives a moiety of his lands remaining after his debts are paid, and the residue of his estate, with the reversion of the land given to his wife, to go to his children. The executors ought not to sell the reversion of the moiety devised to the wife: if they do, a court of equity will set it aside upon the application of the children. *Brock vs Philips.* 68

3. An action of covenant respecting real estate, will lie against executors, tho' not specially bound.

Harrison's Ex. vs Sampson. 155

4. In debt upon judgment recovered against an executor, upon motion, the declaration sug-

gested a devastavit of assets which accrued after the judgment rendered; the executor is not precluded from pleading a special plene administravit and from supporting it by proof.

Ruffin vs Pendleton. 184

F

FAIRFAX, Lord.

See NORTHERN NECK;
FOREIGN.

1. For the laws of foreign countries, the decisions of their courts and contracts made there, see LAWS.

FOREIGN MONEY.

See MONEY.

FORTHCOMING BOND.

1. See REPLEVY BOND No 1.

2. A forthcoming bond should be made payable to the creditor and not to the sheriff: the amount of the execution ought to be recited; and the condition should be to deliver the property at the time and place of sale, and not when demanded.

Downman vs Chinn. 189

3. If the bond be defective in any of the above instances, or in others, the court may, and ought upon motion to quash it.

Ib.

4. A faulty forthcoming bond whilst in force, is a satisfaction of the judgment, and a second execution cannot issue until the bond is quashed.

Ib.

5. The common course is to quash the execution as well as the bond, if a motion for that purpose be made; otherwise it is not necessary.

Ib.

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G.

GRANT.

1. See NORTHERN NECK.

LAND.

SETTLEMENT and PREEMPTION.

2. A grant of land made in 1658, tho' it wanted the formal parts of a deed, the court considered as valid, after such a length of time, and being accompanied with possession.

Lee vs Tapscott. 276

3. This grant was signed 'Samuel Mathews,' *W. Claiborne*, and was assigned. The assignment was acknowledged and recorded in the county court. The grant was also recorded. The court considered a copy of this paper as sufficiently authentic, tho' *Matthews* is not stiled Governor, nor is he stated to have signed it *as such*; and although it does not appear that the grant was proved or admitted to record *as an act of the court.* Ib.

GUARDIAN.

1. By the appointment of a second guardian in the room of a former one, the power of the former, as well as his habit of, receiving and disbursing monies generally, on account of the ward, ceases: and therefore payments made by him in depreciated paper money to the subsequent guardian, are not subject to the scale of depreciation.

Walker vs Walke. 195

H.

HUSBAND and WIFE.

1. The commission for taking the privy examination of the wife, must be directed to, and executed by those who are *in fact* justices of the peace; but they need not be *so named* in the commission or certificate: they will be presumed to be such unless the contrary appear.

Harvey et ux vs. Borden. 156

J.

JEOFAILS.

1 Plea to an action of debt upon a prison bounds bond, "that he was not guilty of the premises laid to his charge." "Conditions performed," would have been the proper plea; but this is substantially the same, and is good after verdict.

Payne vs Ellzey. 143

2. See DECLARATION No. 3

3. The omission to lay damages in the declaration, tho' in an action sounding altogether in damages; is cured after verdict by the statute of jefails.

Stephens vs White. 203

4. Construction of the statute of jefails. 209

5. that part of our statute of jefails, which cures 'the omission of all averments, without proving which, the jury ought not to have found such a verdict,' is the adoption of a principle established in the English courts, and which is well explained in the case of *Rushton vs Aspinall*, Dougl. 658. 210

INDEBITATUS

A TABLE OF THE PRINCIPAL MATTERS. 117

INDEBITATUS ASSUMPSIT.

1. See ACTION No. 2.
INFORMATION.

1. In an information against a justice of the peace for bribery in the election of a clerk, it ought to appear certainly, *that an election was holden, and that at that election, the vote was given.*

Newell vs Commonwealth. 88

INJUNCTION.

See CHANCERY.

INQUISITION.

1. The jury upon an inquest of office respecting property estreated or forfeited to the commonwealth, might have been composed of twelve jurors, or of a greater or smaller number, prior to the act of 1794.

Bennet vs Commonwealth. 154

JOINT and SEVERAL.

1. If a bond be made joint without fraud or mistake, equity will not charge the executors of the surety who have become discharged at law by his death, in the lifetime of the principal. *Aliter* if the leading had been to both.

Harrison &c. vs Field. 136

2. See TENDER and REFUSAL, No. 3.
ISSUE.

1. Where the issue was considered to be sufficiently made up.

Walden vs Payne. 1

Turberville vs Self. 71

JUDGMENT.

See DEBT No. 2. 3.

APPEAL &c. No. 7.

JURISDICTION.

1. The court of one county, may relieve against a judgment at law rendered in another, by way of original jurisdiction; and though it cannot award a new trial at the bar of that other court, yet it may direct an issue to be tried at its own bar. And if the relief be afforded without the trial of an issue where that was necessary, the High Court of Chancery upon an appeal, may after reversal, retain the cause, and direct an issue to be tried at the bar of that, or of any other court.

Ambler vs Wyld. 36

2. See CHANCERY, No. 1

3. A bond taken upon replevyng property distrained for rent, must be returned to the court to which the officer levying the distress belongs, or to the court of that county in which the land lies.

Ferguson vs Moor. 54

4. Consent of parties cannot give jurisdiction where the court has it not. But this principle, is only applicable to a case of original jurisdiction.

Bogle vs Fitzhugh. 213

5. Wherever a case is fully and fairly tried in a court of law, the decision is binding upon the parties, and can only be examined in an appellate court. The court of Chancery can not interfere.

Picket vs Morris. 255

6. But

12. A TABLE OF THE PRINCIPAL MATTERS.

6. But if the court refuse to decide points of law, or to reserve them, and will submit all such points to the jury, the trial cannot be said to be a fair one, and Chancery may interfere. *Ib.*

JURY.

8. The number of jurors upon an inquest of office respecting escheated property, might have consisted of twelve, or more, or less, prior to the act of 1794.

Bennet vs Commonwealth. 154

L.

LAND,

1. The act of 1779, establishes the rights of prior settlers and gives *pre-emption* when vacant lands can be found adjoining. But a right to *pre-emption* in the adjacent land, as a consequence of *settlement*, cannot prevail against a right claimed under a survey of the adjacent land, made prior to 1779.

Burnsides vs Reid. 43

2. See NORTHERN NECK.

3. No objection, that more land is surveyed than the quantity specified in the warrant.

Johnson vs Buffington. 116

4. In 1756, a warrant from the proprietors office issued to B, which was surveyed in 1757. In 1768, the land was surveyed for C, and in 1770; and not before, B, tendered the composition and office fees and demanded a grant, which was refused. A few months

after this, a grant was made to C. A court of equity ought not to afford relief to B, after so unreasonable a delay in completing his title.

Curry vs Burns. 121

5. Eleven years, unaccompanied with exculpatory circumstances, is an unreasonable time for the owner of a survey in completing his title. *Ib.*

LAWS.

1. The laws of the country where a contract is made, (the contract not being made with a view to performance elsewhere,) must govern the fate of it.

Walder vs Arell. 282. 295.

2. The municipal laws of each of the state governments of this country, are foreign to the others. 298

3. One country will not execute the *penal* laws of another. But if a person be discharged from a debt by a tender and refusal made in a foreign country, by force of the laws of that other country; he may defend himself in our courts by relying upon the tender and refusal, and the laws under which he was discharged. 295 &c.

4. The *Pennsylvania* act of Assembly of January 1777, making certain bills of credit a legal tender, embraces continental, as well as state bills, in that part of it, which makes a tender and refusal a forfeiture of the debt. *Ib.*

5. The

A TABLE OF THE PRINCIPAL MATTERS. 13.

5. The above act, so far as it relates to a tender and refusal, of continental bills, producing a forfeiture of the debt, was not virtually repealed by the third section of the act of May 1778: this latter law, only related to the omissions subsequent to the 29th January 1777. *Ib.*

6. The decisions of the courts of a foreign country, as to the constructions of their own laws though not binding upon the courts of this country, will yet be regarded and respected. *Ib.*

7. Where there are too affirmative statutes, if they do not conflict with each other, but may be so construed, as that both may stand, the latter will not be considered as virtually repealing the other. *Ib.*

8. Repeals by implication not favored. *Ib.*

LEASE.

1. See REPLEVY BONDS,

No. 3.

2. If the lessee assign without the privity or assent of the lessor, the lessor is not bound thereby, but may consider the original lessee as the *tenant in possession*, and a replevy bond signed by the original lessee; will be good under the act of Assembly.

Ferguson vs Moor. 57

LIEN.

1. The vendor of land, not taking a security, nor making a conveyance, retains a lien upon the property, and equity

will decree a sale for the satisfaction of the purchase money. And this lien exists (even tho' a conveyance were made) against the *vendee*, or a purchaser from him *with notice*.

Cole vs Scott. 144

M.

MILLS.

1. Upon an appeal from an order giving leave to build a mill, the record should state that it appeared to the court, that the bed of the water course was in the applicant, or in the commonwealth.

Richards vs Hoome. 36

2. Where an application is made for leave to build a mill, it should appear; that the party whose property is sought to be condemned, had 10 days previous notice of the motion for the writ of *ad quod damnum*. This might be dispensed with, if it appeared by the record, that he appeared and contested the application *upon the merits*. An appearance generally would not be sufficient.

Bernard vs Brewer. 76

3. The writ of *ad quod damnum* may be executed by the *deputy sheriff*.

Wroe vs Harris. 126

4. Where the person applying for leave to build a mill, has land on one side only of the stream, it should be stated, that the bed of the river is in himself, or in the commonwealth; but this is not necessary if he own the land on both sides. *Ib.*

5. It

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5. It is not necessary, that the inquisition should say any thing respecting the injury which the land below the dam may sustain. *Ib.*

MONEY.

1. See ACT of ASSEMBLY

No. 1

DEPRECIATION No. 2. 3.

APPEALS, &c. No. 7.

DEBT, No. 2. 3.

2. A sterling debt may be sued for, without laying the value in current money: if laid, it is mere surpluſage, and will not vitiate, but in ſuch caſe, the damages alſo ſhould be laid in ſterling money. The verdict and judgment ſhould be for ſterling, and the court are to fix the rate of exchange.

Skipwith vs Baird. 165

MOTION.

1. The clerk, having entered up a judgment by *nil dicit* in the Diſtrict Court, on a bond for the payment of tobacco, without noticing a memorandum endorsed on the bond, which confined the tobacco to certain inſpections; this court conſidered the miſtake as being merely clerical, and ſuch, as might have been corrected at a ſubſequent term upon motion.

Gordon vs Coſby. 130

2. See FORTHCOMING BONDS

No. 2, 3, 4, 5.

N.

NEW TRIAL.

1. See CHANCERY No. 1

JURISDICTION No. 2

NORTHERN NECK.

1. *Lord Fairfax*, had a right to eſtabliſh rules of office for granting out his lands, and in caſe of forfeiture incurred by a non compliance with thoſe rules, he was at liberty to grant the lands ſo forfeited to others.

Pickett vs. Dowdal 106.

2. The iſſuing of a warrant to a ſecond applicant, is a ſufficient evidence of the proprietor's intention to take advantage of the forfeiture. *Ib.*

3. An entry of *Lord Fairfax* for forfeiture, was not neceſſary, except where a grant had been made, the iſſuing of a ſecond grant was ſufficient. 114

4. Thoſe who took up lands within this diſtrict; are preſumed to have had notice of the rules of office. 113

5. The act of 1785, c. 47 relates merely, to the *unappropriated lands* within this diſtrict; and therefore it does not authoriſe the granting of lands for which warrants were iſſued by the proprietor, although they were forfeited according to the rules of office, unleſs the proprietor had ſhewn his intention to take advantage of the forfeiture; ſuch titles were confirmed by the act of 1786 c. 3.

Johnson vs Buffington. 116

6. The act of 1786 c. 3. does not authoriſe the Register to make grants in caſes where grants had been previously made to others by *Lord Fairfax*. 112

7. In 1756, a warrant from the

the proprietor's office issued to B, which was surveyed in 1757. In 1768, the land was surveyed by C, and in 1770, and not before, B tendered the composition and office fees, and demanded a grant, which was refused. A few months after this, a grant was made to C.—A court of equity ought not to afford relief to B after so unreasonable a delay in completing his title. *Curry vs Burns* 121

8. The court would not decide what ought to be considered as a reasonable time to indulge the owner of a survey in completing his title. Each case ought to stand upon its own particular circumstances. But a delay of 11 years without exculpatory circumstances, is an unreasonable time. *Ib.*

NOTICE.

1. See EVIDENCE No. 3. MILLS No. 2.

2. Where the owner of a survey has forfeited his right by not obtaining a title within the time prescribed, notice to a subsequent applicant will not affect his title, unless the original claimant had been prevented by fraud from obtaining a legal title. *Pickett vs Dowdall.* 45

O.

OBLIGATION.

1. Memorandums endorsed on a bond are to be considered in like manner as if they were incorporated with the bond.

Gordon vs Frazer. 130.

2. See SURETY No. 1.2. ASSIGNMENT No. 2. 3. 4.
3. The assignee of a bond tho' for valuable consideration and without notice, takes the same subject to all the equity of the obligor. *Norton vs Rose.* 253

OYER.

1. Tho' you cannot have advantage of the writ to plead a variance without craving oyer of it, yet you may apply to it to amend by.

Stephens vs White. 212,

P.

PENNSYLVANIA.

1. See LAWS.
PLEAS and PLEADING.

1. In replevin, the plaintiff upon the plea of *nil debet*, may give in evidence an award made since the distress taken, (but respecting pre-existing accounts,) in order to show that nothing was due to the avowant.

Turberville vs Self. 71

2. See JEOFAILS No. 1. 3.

OYER No. 1.

VERDICT No. 3.

3. In debt upon a judgment recovered against an executor, upon motion, the declaration suggested a devastavit of assets which accrued after judgment rendered. The executor is not precluded from pleading a special *plene administravit*, and from porting it by proof.

Ruffin vs Pendleton. 184

5. In assumpsit, the gist of the action is the promise to pay, and unless

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unless this be avered, the omission is not cured by the verdict.
Winston's Ex. vs Francisco. 187

POWER.

1. See EXECUTOR No. 4.

PRACTICE.

1. See EVIDENCE No. 2. 3.
- APPEAL No 3. 4. 5. 6. 10.

2. Where there is no appearance entered for the appellant the appellee may move before the record is opened to dismiss the appeal, but not afterwards.

Collins vs Lowry. 75

3. In all cases where a general commission issues for taking depositions upon an answer and replication in any suit in the High Court of Chancery, the cause must remain at rules six months from the time of entering the replication, before it is set down for hearing, unless this be dispensed with by consent of parties entered on the record.

Dalby vs Price. 191

PRESUMPTION.

See DEED No. 5.

PROFERT.

1. Profert of a bill of exchange is not necessary.

Terrel vs Atkinson's Ex. 143

PROMISSORY NOTES.

1. If a promissory note be signed and sent to the payee, in blank for him to fill up with the amount, it is good evidence upon the plea of *nil debit*.

Fordon vs Nelson. 164

2. See ASSIGNMENT No. 3.

PURCHASE.

1. See EXECUTORS No. 4.

R.

RELATION.

1. A grant relates back to the warrant, which is the inception of the title, but not so as to work an injury to others by destroying intervening rights, fairly and legally acquired.

Picket vs Dowdall. 113

RENT.

1. See REPLEVY BOND No. 3

3. Property distrained for rent, can only be sold by an officer.

Ferguson vs Moor. 57

REPLEVY BONDS.

1. In what case of fraud or improper conduct in the commissioners, a replevy bond taken by them may be quashed.

Hendricks vs Dundas. 50

2. A bond taken upon replevyng property distrained for rent, must be returned to the court to which the officer levying the distress belongs, or to the court of that county in which the land lies.

Ferguson vs Moor. 54

3. A bond taken upon replevyng property distrained for rent, is good, if signed by the original lessee, though not the tenant in actual possession, nor the owner of the property distrained, if he hath assigned to a third person, without the privity or assent of the lessor.

Ferguson vs Moor. 57

S.

SCIRE FACIAS.

1. The second *sci fa* against the special bail issued on the 3d of April

April

April 1771, returnable to the October term; and was returned 'not found.' At June court, the bail moved to surrender the principal which was refused.

Afterwards in 1773, the motion was renewed *by consent of parties*, when the court permitted the render. The court were not precluded from making the latter decision, the motion being brought on again *by consent*, and they decided properly, since the writ being made returnable to an *improper day*, it was merely *void*, and consequently the first motion was made in time.

Bogle vs Fitzbush. 213

SET-OFF.

1. Where an assigned bond was not allowed to be set-off.

Turberville vs Self. 71

2. See DISCOUNT No. 1. SETTLEMENT AND PRE-EMPTION.

1. See LAND, No. 1. SHERIFF.

1. Process in this country, may be executed by the *deputy* in all cases, unless where the *high Sheriff* is required to go *in person*. Writs of *ad quod damnum* may consequently be executed by the deputy.

Wroe vs Harris. 126

2. See ERROR No. 2. SLAVES.

1. Slaves from their nature are chattels, and though in the hands of executors, they are exempted from the payment of debts, where there is a suffi-

ciency of other personal estate, they are still assets.

Walden vs Payne. 7

2. Slaves are real estate only in particular cases, such as descents &c. *Ib.*

3. An executor is not bound by the order of a county court directing a division of the estate of a testator among his distributees, to deliver up slaves, without reserving a sufficiency to pay the debts, or without taking bonds to refund. *Ib.*

SPECIFICK PERFORMANCE.

1 See AGREEMENT No. 1.

STATUTES.

1. See LAWS.

STERLING.

1. See MONEY.

SUPERSEDEAS.

1. See APPEAL.

SURETY.

1. If a joint bond be given for money loaned to the principal, a court of equity will not charge the executors of the surety if they become discharged at law by the death of the surety before the principal.

Harrison &c. vs Field &c. 136

2. If the lending be to both, it creates a moral obligation in both to pay, and though the remedy be lost at law, equity will enforce the moral obligation against both. *Ib.*

T.

TENDER AND REFUSAL.

1. A tender and refusal of continental bills, in the state of *Pennsylvania*, in discharge of a *Pennsylvania* debt, in March

1780.

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1780, did under the laws of that state, (the requisites of those laws being complied with) produce a forfeiture of the debt.

Warder vs Arell. 282

2. See LAWS.

3. A tender, which if refused produces a forfeiture of the debt, if made to one obligee, is equal to a tender made to all.

Warder vs Arell. 297 &c.

TROVER AND CONVERSION,

1. In trover and conversion, the declaration need not state the price of the thing converted, though it is otherwise in detinue.

Pearpoint vs Henry. 192

U.

USES AND TRUSTS.

1. As to persons in *esse*, the legal estate is executed immediately, and as to persons not in *esse*, it vests immediately, upon their coming into being, *if they come in good time*, otherwise it goes over to the next remainder man.

Roy vs Garnett. 35

2. See DEVISE No. 1. 2.

V.

VARIANCE.

1. What is, as to the name of a person.

Johnson vs Buffington. 116

2. Tho' you can not have advantage of the writ to plead a variance without craving oyer of it, yet you may apply to it to amend by, though oyer was not taken.

Stephens vs White, 212

3. Declaration upon a bond executed to A. and assigned to the plaintiff. The bond produced in evidence had an assignment endorsed to B. which had been stricken out except the signature of the obligee, above which was endorsed an assignment to the plaintiff. The erasure of the former assignment does not produce a variance between the obligation and the proof. If any foul, or improper conduct had appeared in the transaction, it might have been otherwise.

Drummond vs Crutcher. 218

VERDICT.

1. In an action for freedom, a verdict finding the mother, (the plaintiff) free, or a slave, is *conclusive evidence* between a child of the plaintiff, and one claiming under the defendant in that suit.

Shelton vs Barbour. 64.

2. See CHANCERY No. 3. DEBT, No. 1.

JEOFAILS, No. 1.

DECLARATION, No. 1.

3. The defendant pleaded a special *plene administravit*, and that he hath not, nor had any goods except to a certain value, which were not sufficient to satisfy the judgment mentioned in the plea. Replication, that he hath and had &c. goods &c. *more than sufficient* to satisfy the said judgments *whereof he could have satisfied the plaintiff*. Verdict "for the debt in the declaration mentioned." This verdict

dict is insufficient: it ought to have found that the defendant had goods &c. *more than sufficient* to satisfy the judgments, whereof he could have satisfied the plaintiff, or the *value of the assets* if they were not sufficient.

Booth's Ex. vs Armstrong. 301

W.
WILL.

1. Construction of.

Harvey et ux vs Borden. 156

WITNESS.

1. The testimony of a witness tending to fix a fraud upon himself, ought not to be regarded.

Claiborne vs Parish. 146

TABLE OF THE THERMAL MATTERS



